TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906

No. [redacted]35.

FREDERIC L. GRANT SHOE COMPANY, BANKRUPT,
PLAINTIFF IN ERROR,

vs.

W. M. LAIRD COMPANY, OF PITTSBURG, PA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

FILED MARCH 9, 1907.

(20,604.)

1 United States District Court, Western District of New York.

In re FREDERIC L. GRANT SHOE CO., an Alleged Bankrupt.

To the Hon. John R. Hazel, Judge of the District Court of the United States for the Western District of New York:

The petition of W. M. Laird Co., of Pittsburg, Pa., respectfully shows:

First. That the above named Frederic L. Grant Shoe Co., of the City of Rochester, in said District, is a corporation duly incorporated and existing under and by virtue of the Laws of the State of New York, and having its office and principal place of business in the City of Rochester, County of Monroe and State of New York.

Second. That for the greater portion of the six months next preceding the date of the filing of this petition said Frederic L. Grant Shoe Co. has had its office and principal place of business at the City of Rochester aforesaid, in said Western District of New York, and that said organization was organized for, has been and is by occupation, a manufacturer of shoes and is engaged principally in manufacturing and mercantile pursuits.

Third. That said Frederic L. Grant Shoe Co. owes debts to the amount of $1,000 and over and is insolvent.

2 Fourth. That as your petitioner is informed by the president of said Frederic L. Grant Shoe Co., and verily believes, said Frederic L. Grant Shoe Co. has less than twelve creditors.

Fifth. That your petitioner is a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey, engaged in the business of buying and selling shoes and foot-wear, and having its office and principal place of business in the City of Pittsburg, State of Pennsylvania.

Sixth. That your petitioner is a creditor of said Frederic L. Grant Shoe Co., having provable claims against it amounting in the aggregate to more than $500, and that your petitioner has no security of any kind for said debt, or any part thereof, nor has your petitioner received a preference within the meaning of the bankruptcy act as amended.

Seventh. That your petitioner's claim arises from the following transactions and circumstances: On or about September 3d, 1902, and between that date and May 22d, 1903, your petitioner purchased of said Frederic L. Grant Shoe Co., at various times and in various amounts, merchandise consisting of women's shoes, said shoes to be manufactured by said Frederic L. Grant Shoe Co. for your petitioner in accordance with samples shown your petitioner at the various times that the orders therefor were given. That in pursuance of such orders so given said shoes were manu-

3 factured by said Frederic L. Grant Shoe Co. and delivered to your petitioner, said shoes so delivered aggregating several thousand pairs. That your petitioner, upon receipt of said shoes from time to time, remitted and paid to said Frederick L. Grant

Shoe Co. the price agreed to be paid therefor, and all of said shoes so delivered have been fully paid for in accordance with the terms upon which the same were purchased. That prior to the purchase of any of said shoes said Frederic L. Grant Shoe Co. did, for a valuable consideration and in consideration of the purchase by your petitioner of said merchandise, expressly agree, guarantee and warrant that all shoes which they might thereafter manufacture for and sell to your petitioner, would be first-class in every particular, both as to workmanship and materials, and would give perfect satisfaction. That such express warranty was made and was a part of the transaction upon each purchase of shoes hereinbefore referred to. That said Frederic L. Grant Shoe Co. has made a breach of said express warranty, in that of the shoes sold and delivered to your petitioner as aforesaid there were, and are, 1864 pairs of women's high heeled shoes which do not give satisfaction to your petitioner or its customers and which are defective in workmanship and materials, in that the heels are not made of proper materials, the soles are not made of proper materials, the facing of the heels is not made of proper materials, and the covering of the heels is not made of proper materials, and the adhesive substance used in the manufacture of said shoes was not a proper substance to use for that purpose. That said defects were, and are, latent defects, being undiscover-
4 able upon an examination of the shoes as they came from the factory. The result of such defects is that the soles of said shoes crack and split, the leather facing of the heel peels off, and the outer covering of the heel becomes loosened and comes off, and furthermore, the wooden foundation of the heel splits and breaks, so that the shoe cannot be worn. That by reason of the facts and circumstances hereinbefore alleged, your petitioner has suffered damage in the sum of $3,732.80, which is the amount of its claim against said Frederick L. Grant Shoe Co.

Eighth. That within four months preceding the filing of this petition, and on or about May 15th, 1903, the said Frederic L. Grant Shoe Co., while insolvent, committed an act of bankruptcy, in that, as your petitioner is informed by the president of said Frederic L. Grant Shoe Co. and by one McAuliffe, an agent and representative of the German American Bank of Rochester, and verily believes, it did sell, assign, transfer and set over unto said German American Bank of Rochester, N. Y., a domestic banking corporation, all of its property, of every name and nature, consisting of stock and materials on hand, machinery, tools, office furniture and fixtures, cash on hand, bills and accounts receivable and other assets, upon the understanding and agreement that said bank, being the principal creditor of said Frederic L. Grant Shoe Co., would pay the other creditors of said Frederic L. Grant Shoe Co., except your petitioner, the amount of their various claims, which are comparatively small in amount, and would out of the proceeds of said property reimburse itself for such payments and pay to itself the
5 amount of the indebtedness to it of said Frederic L. Grant Shoe Co. That the result of such transfer is that all of the creditors of said Frederic L. Grant Shoe Co., except your petitioner,

will receive a large percentage of the amount of their claims, and that your petitioner will receive nothing upon its claim.

Ninth. That within four months preceding the filing of this petition, and since May 1st, 1903, said Frederic L. Grant Shoe Co., being at all of said times insolvent, committed other acts of bankruptcy, in that it did, from time to time, pay various creditors to which it was indebted, whose names and addresses are unknown to this petitioner, various amounts in settlement of the claims of said creditors, and in that since said May 1st, 1903, it has from time to time, the precise dates being unknown to this petitioner, paid to said German American Bank various sums, the amounts of which are unknown to this petitioner, to apply upon the indebtedness to said German American Bank of said Frederic L. Grant Shoe Co., and in that it paid to the estate of C. B. Woodworth, a creditor, on or about June 20th, 1903, the amount of its indebtedness to said estate, being about the sum of $175.

Tenth. That the result of said transfer to said German American Bank and of said payments to the estate of C. B. Woodworth and to said German American Bank, and to said various other creditors, and each of them, will be that said German American Bank and said estate of C. B. Woodworth and said various other
6 creditors will receive a preference upon their claims over and above other creditors of the same class, and that such transfer and such payments, and each of them, was made by said Frederic L. Grant Shoe Co. with intent to prefer such creditors over its other creditors.

Wherefore, your petitioner prays that service of this petition, with a subpœna, may be made upon said Frederic L. Grant Shoe Co. as provided by the bankruptcy law of 1898, as amended, and that it may be adjudged bankrupt within the purview of such law.

W. M. LAIRD COMPANY, *Petitioner*,
By ELLIOTT S. THOMAS.

McGUIRE & WOOD,
Attorneys for Petitioner,
711-717 *Wilder Building, Rochester, N. Y.*

STATE OF PENNSYLVANIA,
County of Allegheny, City of Pittsburg, ss:

Elliott S. Thomas, being duly sworn, deposes and says that he is a director of W. M. Laird Company, (at the head of the purchasing department and personally acquainted with all the facts herein), the petitioning creditor mentioned and described in the foregoing petition. That said petitioner is a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey, and that he does hereby made solemn oath that the statements of fact contained in said petition are true according to the best
7 of his knowledge, information and belief.

ELLIOTT S. THOMAS.

Subscribed and sworn to before me, this 10th day of July, 1903.
[NOTARIAL SEAL.] E. J. HUMBERT,
Notary Public.

My appointment dated Apr. 21, 1903.
My commission expires end next session of Senate.

ALLEGHENY COUNTY, *State of Pennsylvania, ss:*

I, Andrew J. McQuitty, Prothonotary of the Court of Common Pleas, No. 2, in and for the County of Allegheny, in the Commonwealth of Pennsylvania, the same being a Court of Law and Record and having a seal, do hereby certify that E. J. Humbert Esquire, before whom the foregoing Affidavit was taken, and who has thereunto, in his own proper handwriting, subscribed his name, to the certificate of the proof or acknowledgment of the annexed instrument was at that time, and is now, a Notary Public in and for the Commonwealth of Pennsylvania, resident of said County aforesaid, duly commissioned and sworn and authorized by law to take and certify affidavits and the acknowledgments and proof of deeds to lands, etc., to be recorded, to all whose acts as such due faith and credit are, and of right ought to be, given throughout the United States and elsewhere; and further, that said instrument is executed in accordance with the laws of this Commonwealth, and that I am acquainted with his signature, and believe the same to be genuine.

The Court of Commonwealth Pleas of Allegheny Co., No. 2, Pa.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in said County, this 10th day of July, in the year of our Lord one thousand nine hundred and three.

A. J. McQUITTY, *Prothonotary.*

Endorsed: #1502. United States District Court, Western District of New York. *In re* Frederic L. Grant Shoe Co., an Alleged Bankrupt. Petition. McGuire & Wood, Attorneys for Petitioner, 711-717 Wilder Building, Rochester, N. Y. Filed Jul- 15 1903 at 9:30 O'C A. M. George P. Keating, Clerk.

8 Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA, *W. District of N. Y., ss:*

I hereby certify and return that I served the annexed Subpœna on the therein-named Frederic L. Grant Shoe — by handing to and leaving a true and correct copy thereof and also duplicate petition with Frederic L. Grant President of said Company personally at Charlotte (Ontario Beach) in said District on the 18th day of July, A. D. 1903.

WM. R. COMPTON,
U. S. Marshal,
By ROB'T W. BURNS, *Deputy.*

9 UNITED STATES OF AMERICA, *Western District of New York:*

To Frederic L. Grant Shoe Company, of Rochester, in the County of Monroe, said district, Greeting:

For certain causes offered before the District Court of the United States of America, within and for the Western District of New York, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our said District Court to be holden at Buffalo in said district, on the 25th day of July, A. D. 1903, to answer to a petition filed by W. M. Laird Company of Pittsburg, Pa., in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness, the Honorable John R. Hazel, Judge of said court, and the seal thereof, at the City of Buffalo, this 15th day of July A. D. 1903.

[SEAL OF THE COURT.] GEO. P. KEATING, *Clerk.*

NOTICE TO DEFENDANT.—It is not necessary for you to appear on the return of this subpœna. You may appear and plead to the petition at any time within five days after said return day.

Endorsed: 480 Original. No. 1502 United States District Court, Western District of New York. In Bankruptcy. In the matter of Frederic L. Grant Shoe Co. an alleged bankrupt. Subpœna to alleged bankrupt. Filed Jul- 23, 1903, at — O'C — M. George P. Keating, Clerk.

10 In the District Court of the United States for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, an Alleged Bankrupt. In Bankruptcy. No. 1502.

At the City of Rochester in said District, on the 23rd day of July, A. D. 1903.

And now, the said Frederic L. Grant Shoe Company appears and denies that it has committed the act or any or either of the acts of bankruptcy set forth in said petition, or that it is insolvent, and avers that it should not be declared bankrupt for any cause in said petition alleged, and it demands that the same may be inquired of by a jury.

Second.

The defendant, Frederic L. Grant Shoe Company, by protestation, not confessing nor acknowledging all or any of the matters or things in the said petition of said petitioner mentioned and contained to be true, in such manner and form as the same are therein set forth and alleged for plea to the whole of said petition;

This defendant says that said petitioner, W. M. Laird Company of Pittsburg, Pennsylania is not a creditor in the manner or form alleged in said petition of this defendant and that the alleged demand of said petitioner mentioned and referred to in its said petition, is not provable against said defendant as in said petition al-
11 leged; nor does the alleged demand of said petitioner against said defendant amount to five hundrd dollars, or any other sum, and that said petitioner was not at the time of filing said petition herein, entitled to demand of said defendant for the alleged cause therein stated or for any other cause, the said sum of five hundred dollars, or any other sum, on account of any matter or thing alleged in said petition; that said petitioner has and had no such demand as set forth in said petition, nor had the demand amounting to the sum of three thousand seven hundred thirty-two dollars and eighty cents, ($3732.80), or any other sum due from said defendant to said petitioner for or on account of any matter or thing alleged in said petition, nor for or on account of any breach of any contract or for any other cause amounting in the aggregate to said sum of three thousand seven hundred thirty-two dollars and eighty cents, or any other sums.

Said defendant admits that at the time mentioned in said petition, said defendant was and is a corporation. It denies that it was or is incorporated under the Laws of the State of New York, and on the contrary alleges that it was at all of said times and still is a corporation duly organized, chartered and incorporated under, by virtue of and pursuant to the Laws of the State of Arizona, and having its office and principal place of business in the City of Rochester, County of Monroe and State of New York. Said defendant admits that for the greater portion of the six months next preceding
12 the date of filing of said petition, said defendant had had its office and principal place of business at the City of Rochester, aforesaid, in the Western District of the State of New York, and that said defendant was organized for, has been and is a manufacturer of shoes and is engaged principally in manufacturing and mercantile pursuits. Said defendant admits that it owes debts to the amount of one thousand dollars and over. And it denies that it is insolvent. It admits that it has less than twelve creditors.

Said defendant admits that said petitioner is a corporation organized and existing as is alleged in said petition. Said defendant denies that said petitioner is a creditor or has provable claims against it amounting in the aggregate to more than five hundred dollars or any other sum.

Said petitioner admits that on or about September 3d, 1902, and between that date and May 22nd, 1903, said petitioner purchased of said defendant, at various times, various amounts of merchandise consisting of women's shoes, and that said petitioner has paid said defendant in full the price agreed to be paid therefor. Said defendant denies that prior to the purchase of any of said shoes or at any other time, said defendant did, in consideration of such purchase by said petitioner, or for any other consideration, agree to guarantee or warrant that said shoes so sold by it to said petitioner,

should be firstclass in every or any particular, both as to workmanship or material or as to either, or that they would give perfect satisfaction. Said defendant alleges on the contrary, that none of said sales were accompanied by an express warranty of any
13 kind. And it denies that there has been a breach of said express warranty or any warranty, and upon information and belief it denies that said shoes or any of them were defective in workmanship or material as is alleged in said petition. And it denies that by reason of the facts and circumstances alleged in said petition, that said petitioner has sustained damages in the amount of three thousand seven hundred thirty-two dollars and eighty cents, or in any other sum. And said defendant denies each and every other allegation in said petition contained.

Said defendant alleges upon information and belief that this proceeding was not instituted nor is it prosecuted in good faith upon behalf of said petitioner for the relief afforded by the National Bankruptcy Law of 1898, entitled, "An Act to establish a uniform system of Bankruptcy throughout the Unitd States," but was instituted for sinister, oppressive and vicious purposes and for the purpose of forcing said defendant to pay said petitioner a claim to which it is not entitled. All of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct, and humbly prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Defendant, 9th Floor, German Insurance B'ld'g, Rochester, New York.

14 STATE OF NEW YORK,
Western District of New York, County of Monroe, City of Rochester, ss:

Frederic L. Grant, makes solemn oath, and says: that he is President of the above named defendant, which is a corporation organized, chartered and incorporated under, by virtue of and pursuant to the Laws of the State of Arizona and having its principal place of business at the said City of Rochester. So much of the foregoing answer as concerns his own acts and deeds, is true, to the best of his knowledge, and so much as concerns the acts and deeds of any other person or persons he believes to be true. He further says that the foregoing answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

FREDERIC L. GRANT.

Sworn to before me, this 23d day of July, 1903.

[NOTARIAL SEAL.] S. A. CROSTON,
Notary Public.

Endorsed: No. 1502. United States District Court, Western District of New York. In the Matter of Frederic L. Grant Shoe Company, an alleged bankrupt. Answer. Satterlee, Bissell, Taylor & French, Attorneys for Defendant, 9th Floor German Insurance Building, Rochester, N. Y. E. Filed Jul- 23 1903 at — o'c. — M. George P. Keating Clerk.

15 At a regular Term of the United States District Court, held in and for the Western District of New York, at the Government Building, in the City of Rochester, N. Y., on the 18th day of May, 1905.

Present: Hon. John R. Hazel, District Judge.

United States District Court for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, a Bankrupt. No. 1502.

A petition in involuntary bankruptcy having been filed herein by W. M. Laird Company, praying that the Frederic L. Grant Shoe Company be declared bankrupt, and said alleged bankrupt having filed an answer, denying its insolvency and the commission of any of the acts of bankruptcy alleged in the petition, and demanding a trial by jury of said issues; and said alleged bankrupt having heretofore made a motion to dismiss said petition, and an order having been previously entered herein on September 9th, 1903 denying said motion and directing that the claim of the petitioner, as alleged in the petition, be liquidated by the jury at the jury trial demanded as aforesaid, which order, upon appeal therefrom, was duly af-

16 firmed by the United States Circuit Court of Appeals for the Second Circuit, and the said matters having come on for trial at a regular Term of the United States District Court for the Western District of New York, held at the Government Building, in the City of Rochester, N. Y., on the second Tuesday of May, 1905, and having been tried on the 17th and 18th days of May, 1905, before Hon. John R. Hazel, District Judge, and a jury, Hiram R. Wood, Esq., appearing in behalf of the petitioner, and Porter M. French, Esq., appearing for the alleged bankrupt, and at the close of all the evidence the Court having directed the jury to find a verdict that the said alleged bankrupt did, within four months of the filing of the petition herein, commit an act of bankruptcy, in that it transferred a portion of its property to the German American Bank of Rochester, one of its creditors, with the intent to prefer said German American Bank over its other creditors, and that at the time of said transfer said alleged bankrupt was insolvent, and that the petitioner has a provable claim against said alleged bankrupt for damages for the breach of warranty in the sale of shoes, and that the amount of such claim of the petitioner is the sum of $3,454.00, and the jury having found a verdict accordingly;

Now, upon motion of McGuire & Wood, attorneys for the petitioner, it is

Ordered, adjudged and decreed:

First. That Frederic L. Grant Shoe Company, a corporation, having its principal office and place of business in the City of
17 Rochester, N. Y., is hereby declared and adjudged bankrupt.

Second. That the claim of the W. M. Laird Company, the petitioner herein, against said bankrupt, for damages for breach of warranty in the sale of shoes as alleged in the petition, be, and the same hereby is, liquidated and established at the sum of $3,454.00, at which sum it may be proved and allowed herein.

Third. That the petitioner, W. M. Laird Company, recover and be paid out of the bankrupt's estate in due course of administration, the same costs and disbursements that are allowed to a party recovering in a suit in equity when paid out of a fund in court, the same to be fixed and allowed by the referee to whom this matter shall hereafter be referred.

JOHN R. HAZEL, *U. S. J.*

Endorsed: Original. No. 1502. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Company, a Bankrupt. Adjudication of Bankruptcy and Liquidation of Claim. McGuire & Wood, Attorneys for Petitioner, 711-717 Wilder Building, Rochester, N. Y. Filed Jun- 8 1905 at — o'c. — M. Sidney W. Petrie, Clerk.

18 In the District Court of the United States for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY Bankrupt. In Bankruptcy. No. 1502.

The above entitled cause being a case in which the above named Frederic L. Grant Shoe Company is entitled to take an appeal to the Supreme Court of the United States, from the adjudication of bankruptcy herein, and pursuant to the requirements of General Order in Bankruptcy, numbered thirty-six, I make and file the following finding of facts and conclusions of law thereon, separately:

I find as matter of fact:

First. That on the 15th day of July, 1903, W. M. Laird Company of Pittsburg, Pennsylvania, filed in the office of the Clerk of the United States District Court for the Western District of New York, at Buffalo, New York, its petition against the above named Frederic L. Grant Shoe Company, wherein said petitioner prayed that service of said petition with a subpœna might be made upon said Frederic L. Grant Shoe Company, as provided by the Bankruptcy Law of 1898 as amended, and that it might be adjudged a bankrupt within the purview of such law.

Second. That at the time of filing said petition, said above named Frederic L. Grant Shoe Company was a corporation having its
19 office and principal place of business in the City of Rochester, Monroe County, New York, and that for the greater portion of six months next preceding the date of the filing of said petition,

said Frederic L. Grant Shoe Company had its office and principal place of business at said City of Rochester in said Western District of New York, and that it was organized for, had been and was engaged principally in manufacturing and mercantile pursuits.

Third. That at the time of filing said petition, said Frederic L. Grant Shoe Company owed debts to the amount of one thousand dollars and over, and that it was insolvent; that it then had less than twelve creditors and at that time it owed no debts except an indebtedness owing by it to the German-American Bank of Rochester, and the claim hereinafter set forth on account of damages for breach of warranty which accompanied the sale of personal property, owing to said petitioner.

Fourth. That said petitioner, said W. M. Laird Company, at the time of filing said petition, was a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey, engaged in the business of buying and selling shoes and having its office and principal place of business in the City of Pittsburg, in the State of Pennsylvania.

Fifth. That said petitioner, at the time of filing said petition, was a creditor of said Frederic L. Grant Shoe Company having a provable claim against it amounting to more than five hundred dollars, and that it had no security of any kind for said debt, or any part
20 thereof, and that it had not received a preference, within the meaning of the Bankruptcy Act as amended.

Sixth. That said petitioner, said W. M. Laird Company's claim above referred to, arose from the following transactions and circumstances: On or about September 3rd, 1902, and between that date and May 22nd, 1903, said petitioner purchased of said Frederick L. Grant Shoe Company at various times and in various amounts, merchandise consisting of women's shoes, to be manufactured by said Frederick L. Grant Shoe Company for said petitioner, in accordance with samples shown said petitioner when the orders therefor were given; that said petitioner received said shoes from time to time and remitted and paid to said Frederick L. Grant Shoe Company the price agreed to be paid therefor, and that all of said shoes so delivered had been fully paid for in accordance with the terms upon which they were purchased; that prior to the purchase of any of said shoes, said Frederic L. Grant Shoe Company did, for a valuable consideration, and in consideration of said purchase, expressly guarantee and warrant that said shoes so manufactured and sold by it to said petitioner, should be first-class in every particular, both as to workmanship and materials, and that they would give perfect satisfaction; that said Frederic L. Grant Shoe Company made a breach of said express warranty in that, of the shoes so sold and delivered to said petitioner, as aforesaid, there were a large number of pairs of women's shoes which were defective in workmanship and materials and which were not made of proper materials, by reason of
21 which said petitioner sustained damage in the sum of three thousand four hundred and fifty-four dollars ($3,454.00); that said defects were latent defects and were undiscoverable upon an examination of said shoes by mere inspection.

Seventh. That within four months preceding the filing of said petition herein, said Frederic L. Grant Shoe Company did commit an act of bankruptcy, in that it transferred a portion of its property to said German-American Bank of Rochester, one of its creditors, with intent to prefer said German-American Bank of Rochester over its other creditors.

Eighth. That said Frederic L. Grant Shoe Company on the 28th day of July, 1903, filed in the office of the Clerk of the United States District Court for the Western District of New York, at Buffalo, New York, its answer to said petition, and said matter came on to be heard at a regular term of said United States District Court held in the City of Rochester, New York, commencing on the second Tuesday of May, 1905, and said Frederic L. Grant Shoe Company then and there made a motion to dismiss this proceeding upon the ground that said petitioner had no provable claim against it, that it had no standing in court to ask for an adjudication of bankruptcy, and that this Court had no jurisdiction to entertain said proceeding or to adjudge it a bankrupt; That the only creditor of said Frederic L. Grant Shoe Company, aside from said petitioner, namely, German-American Bank of Rochester, appeared by its counsel and united in said motion, and that said motion was, by the Court, then and there denied.

22 Ninth. That the fact of insolvency and the commission of an act of bankruptcy on the part of said Frederick L. Grant Shoe Company, was then and there, in open court, admitted; whereupon the Court proceeded, with the aid of a jury, to liquidate the said claim of said petitioner. No evidence was offered upon the part of said Frederic L. Grant Shoe Company and the said claim of said petitioner was then and there, thereupon, liquidated at said sum of three thousand four hundred and fifty-four dollars ($3,454.00).

I find as conclusions of law:

First. That at the time of filing said petition, said petitioner, the W. M. Laird Company, had a provable claim against said Frederic L. Grant Shoe Company.

Second. That this Court had jurisdiction to entertain this proceeding and render a judgment adjudging said Frederic L. Grant Shoe Company a bankrupt.

Third. That said Frederic L. Grant Shoe Company a corporation having its principal office and place of business in the City of Rochester, New York, be and it hereby is declared and adjudged a bankrupt.

Fourth. That the said claim of the petitioner, said W. M. Laird Company, against said bankrupt, for damages for breach of warranty in the sale of shoes as alleged in said petition, be and the same hereby is liquidated and established at the sum of three thousand four hundred and fifty-four dollars ($3,454.00), at which sum it may be proved and allowed herein.

23 Fifth. That said petitioner, W. M. Laird Company recover and be paid out of the bankrupt's estate, in due course of administration, the same costs and disbursements that are allowed to a party recovering in a suit in equity when paid out of the funds in

court, the same to be fixed and allowed by the referee to whom this matter shall hereafter be referred.

Dated June 7th, 1905.

JOHN R. HAZEL, *U. S. J.*

O. K.
McG. & WOOD.

Endorsed: No. 1502. United States District Court, Western District of New York. In the Matter of Frederic L. Grant Shoe Company, Bankrupt. In Bankruptcy No. 1502. Finding of Facts and Conclusions of Law. Filed Jun- 8 1905, at — o'c- M., Sidney W. Petrie, Clerk.

24 United States District Court, Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, an Alleged Bankrupt. In Bankruptcy. No. 1502.

Motion to Dismiss Petition in Bankruptcy.

McGuire & Wood, for petitioning creditors.
Satterlee, Bissell, Taylor & French, for defendant.

HAZEL, *J.:*

The question presented on this motion to dismiss the petition in involuntary bankruptcy is whether a creditor having an unliquidated claim may file a petition in bankruptcy against a debtor, and how such a claim may be liquidated in accordance with the provisions of Sec. 63 (*b*) of the bankrupt act. The debt which is unliquidated and disputed by the bankrupt is for damages arising out of a breach of warranty upon the sale of personal property. This precise question has been decided by Judge Brown and by Judge Thomas *In Re* Manhattan Ice Co., 7 A. B. R., 408, affirmed 8 A. B. R., 569. It was there held that a creditor having an unliquidated debt may file a petition in bankruptcy to have the debtor adjudged bankrupt, provided the debt is provable. As the petitioning creditor here has a provable debt, though the amount thereof is undetermined, the rule announced by Judge Brown will be followed. As a jury trial
25 has been demanded the amount of petitioner's claim may be established upon the trial in connection with petitioner's other proof. Motion to dismiss denied.

Endorsed: In Bankruptcy No. 1502. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Co., an alleged bankrupt. Opinion. Hazel J. Filed Sep. 1 1903, at — o'c- — M. George P. Keating, Clerk.

26 In the District Court of the United States for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, Bankrupt. In Bankruptcy. No. 1502.

The Frederic L. Grant Shoe Company, the above named appellant, hereby assigns error to the decision and judgment of the District Court of the United States for the Western District of New York, herein, in the following particulars:

First. In that it decided that under the petition and answer in this case it had jurisdiction to entertain the proceeding and render a judgment adjudging the said Frederic L. Grant Shoe Company, said appellant, is a bankrupt.

Second. That said District Court had no jurisdiction to so adjudge, because it appears from said petition and answer, that said petitioner, said W. M. Laird Company, at the time of filing said petition, had no provable claim against said Frederic L. Grant Shoe Company, to the extent of five hundred dollars or any other sum.

Third. That said District Court had no jurisdiction to so adjudge that said Frederic L. Grant Shoe Company, said appellant, is a bankrupt, because it appears from said petition and answer herein, that the claim of said petitioner in bankruptcy, said W. M. Laird
27 Company, is based wholly upon damages alleged to have been sustained by it by reason of a pretended breach of the warranty which accompanied the sale of personal property, which damages had never been in any way liquidated, and the pretended facts upon which said damages are based, are by said answer, denied.

Fourth. That said District Court had no jurisdiction to so adjudge that said Frederic L. Grant Shoe Company, said appellant, is a bankrupt, because under the Bankruptcy Act of 1898, there is no possible way for said petitioner's claim in bankruptcy to become liquidated, excepting pursuant to the provisions of Section 63-*b*, which provides for liquidating unliquidated claims in such manner as the court shall direct and that thereafter such claims may be proved and allowed against the estate; that the statute plainly shows the intention that there shall first be an adjudication in bankruptcy before such unliquidated and disputed claim can be in any manner proven.

Fifth. That said District Court had no jurisdiction to so adjudge that said Frederic L. Grant Shoe Company, said appellant, is a bankrupt, in that said United States District Court for the Western District of New York, erroneously denied the motion of said Frederic L. Grant Shoe Company, said appellant, to dismiss said proceeding, upon the ground that said petitioner, said W. M. Laird Company, had no provable claim at the time of filing its petition and that said Court was wholly without jurisdiction.

Dated June 7, 1905.

SATTERLEE, BISSELL, TAYLOR & FRENCH,

Attorney for Frederic L. Grant Shoe Company, Appellant, 9th Floor German Insurance Building, Rochester, New York.

28 Endorsed: No. 1502. United States District Court, Western District of New York. In the Matter of Frederic L. Grant Shoe Co., Bankrupt. Assignment of Error. Satterlee, Bissell, Taylor & French, Attorneys for Bankrupt, Appellant, 9th Floor German Insurance Building, Rochester, N. Y. Filed Jun- 8 1905 At — o'c- — M. Sidney W. Petrie, Clerk.

29 United States District Court for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, an Alleged Bankrupt. No. 1502.

The Frederic L. Grant Shoe Company, the above named bankrupt, hereby assigns error to the decision and judgment of the District Court of the United States for the Western District of New York, herein, in the following particulars:—

First. In that it decided that under the petition and answer in this case it had jurisdiction to entertain the proceeding and render a judgment adjudging that said Frederic L. Grant Shoe Company, is a bankrupt.

Second. That said District Court had no jurisdiction to so adjudge, because it appears from said petition and answer, that said petitioner, said W. M. Laird Company, at the time of filing said petition, had no provable claim against said Frederic L. Grant Shoe Company, to the extent of five hundred dollars or any other sum.

Third. That said District Court had no jurisdiction to so adjudge that said Frederic L. Grant Shoe Company is a bankrupt, because it appears from said petition and answer herein, that the claim of said petitioner in bankruptcy, said W. M. Laird Company,

30 is based wholly upon damages alleged to have been sustained by it by reason of a pretended breach of the warranty which accompanied the sale of personal property, which damages had never been in any way liquidated, and the pretended facts upon which said damages are based, are by said answer, denied.

Fourth. That said District Court had no jurisdiction to so adjudge that said Frederic L. Grant Shoe Company is a bankrupt, because under the Bankruptcy Act of 1898, there is no possible way for said petitioner's claim in bankruptcy to become liquidated, excepting pursuant to the provisions of Section 63—*b*, which provides for liquidating unliquidated claims in such manner as the court shall direct and that thereafter such claims may be proved and allowed against the estate; that the statute plainly shows the intention that there shall first be an adjudication in bankruptcy before such unliquidated and disputed claim can be in any manner proven.

Fifth. That said District Court had no jurisdiction to so adjudge that said Frederic L. Grant Shoe Company is a bankrupt, in that said United States District Court for the Western District of New York, erroneously denied the motion of said Frederic L. Grant

Shoe Company, said bankrupt, to dismiss said proceeding, upon the ground that said petitioner, said W. M. Laird Company, had no provable claim at the time of filing its petition and that said Court was wholly without jurisdiction.

Dated February 6th, 1907.

SATTERLEE, BISSELL, TAYLOR & FRENCH,

Attorneys for Frederic L. Grant Shoe Company, said Bankrupt, 9th Floor German Insurance Bldg., Rochester, N. Y.

31 Endorsed: U. S. District Court, Western District of N. Y. No. 1502. In the matter of Frederic L. Grant Shoe Company An Alleged Bankrupt. Assignment of Error. Satterlee, Bissell, Taylor & French, Attorneys for said Bankrupt. Office and Post Office Address, 9th Floor German Insurance Building, Rochester, N. Y. Filed Feb. 6 1907, at — o'c. — M. Sidney W. Petrie, Clerk.

32 United States District Court, Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, Bankrupt, Plaintiff in Error,

against

W. M. LAIRD COMPANY, Petitioning Creditor, Defendant in Error.

And now comes Frederic L. Grant Shoe Company, the above named bankrupt herein, and says:

That on or about the 8th day of June, 1905, the United States District Court for the Western District of New York, entered a judgment herein upon the petition of the above named petitioning creditor, adjudging the above named Frederic L. Grant Shoe Company a bankrupt, in which judgment and the proceeding had prior thereto in this cause certain errors were committed to the prejudice of said Frederic L. Grant Shoe Company, all of which will more in detail appear from the Assignment of Errors, which is filed with this petition.

Wherefore the above named bankrupt, the said Frederic L. Grant Shoe Company prays that a Writ of Error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

33 Dated February 6, 1907.

SATTERLEE, BISSELL, TAYLOR & FRENCH,

Attorneys for said Frederic L. Grant Shoe Company, said Bankrupt, 9th Floor German Insurance Building, Rochester, N. Y.

Endorsed: No. 1502. U. S. District Court, Western District of N. Y. In the Matter of Frederic L. Grant Shoe Company, Bankrupt, Pl'ff in error *vs.* W. M. Laird Company, Petitioning Creditor, Def't in error. Petition for Writ of Error. Satterlee, Bissell, Taylor & French, Attorneys for Plaintiff in error, Office and Post Office Address, 9th Floor German Insurance Building, Rochester, N. Y. Filed Feb. 6 1907 at — o'c. — M. Sidney W. Petrie, Clerk.

34 United States District Court, Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, an Alleged Bankrupt. No. 1502.

On this sixth day of February, 1907, comes the above named Frederic L. Grant Shoe Company, by its attorneys, and files herein and presents to the Court its petition, praying for the allowance of a writ of error, and an assignment of errors, intending to be urged by it; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the writ of error upon the said Frederic L. Grant Shoe Company, giving bond according to law in the sum of two hundred and fifty dollars ($250.00), which shall operate as a supersedeas bond. The Aetna Indemnity Company is accepted on said bond as surety, and said bond is now approved.

Dated February 6th, 1907.

JOHN R. HAZEL,
United States District Judge,
for the Western District of New York.

35 Endorsed: No. 1502. U. S. District Court, Western District of N. Y. In the Matter of Frederic L. Grant Shoe Company, an alleged bankrupt. Order Allowing Writ of Error. Satterlee, Bissell, Taylor & French, Attorneys for said Bankrupt, Office and Post Office Address, 9th Floor German Insurance Building, Rochester, N. Y. Filed Feb. 6 1907. At — o'c- — M. Sidney W. Petrie, Clerk. E.

36 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judge of the District Court for the Western District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Frederic L. Grant Shoe Company, Bankrupt, plaintiff

in error, and W. M. Laird Company of Pittsburg, Pa., defendant in error, a manifest error hath happened to the great damage of the said Frederic L. Grant Shoe Company, plaintiff in error, in that it has been adjudged a bankrupt, as, by its complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in the City of Washington within thirty days from the date hereof in the said Supreme Court. That the record and proceedings aforesaid be inspected, and the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of February, in the year of our Lord, one thousand nine hundred and seven.

[Seal United States District Court, Western District of New York.]

SIDNEY W. PETRIE,
Clerk U. S. District Court,
Western District of New York.

37 Allowed by
JOHN R. HAZEL,
United States District Judge
for the Western District of New York.

38 [Endorsed:] # 1502. U. S. District Court. Western District of N. Y. In the Matter of Frederic L. Grant Shoe Company, An Alleged Bankrupt. Writ of Error. Satterlee, Bissell, Taylor & French, Attorneys for said Bankrupt. Office and Post Office Address, 9th Floor German Insurance Building, Rochester, N. Y. Filed Feb. 6, 1907. At — o'c- — M. Sidney W. Petrie, Clerk.

39 In the District Court of the United States for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, Bankrupt. In Bankruptcy. No. 1502.

In this case I hereby certify that when said case came on to be heard at a Term of this Court, held at the City of Rochester commencing on the second Tuesday of May, 1905, counsel for the alleged bankrupt, said Frederic L. Grant Shoe Company, at the opening of said hearing, moved to dismiss said petition in bankruptcy and the proceedings herein, upon the ground, as alleged, that said Court had no jurisdiction to entertain said proceeding or to

render a decree, or order an adjudication of bankruptcy herein against said alleged bankrupt, for the reason that said petitioner, W. M. Laird Company had, at the time of filing its petition herein, no provable claim against said alleged bankrupt to the extent of five hundred dollars or any other sum, and had no standing in court to ask that said alleged bankrupt be adjudged a bankrupt; for the reason that the claim of said petitioner in bankruptcy, said W. M. Laird Company, is based wholly upon damages alleged to have been sustained by it by reason of a pretended breach of the warranty which accompanied the sale of personal property, which damages had never been in any way liquidated, and the pretended facts upon which said damages are based are by the answer herein denied; for the reason that under the Bankruptcy Act of 1898, there is no possible way for said petitioner's claim in bankruptcy to become liquidated, except pursuant to the provisions of Section 63-*b*, which provides for liquidating unliquidated claims in such manner as the court shall direct and that thereafter such claims may be proved and allowed against the estate; for the reason that the statute plainly shows the intention that there shall first be an adjudication in bankruptcy before such unliquidated and disputed claim can be in any manner proven; for the reason that under the circumstances shown by the petition and answer herein, said Court was wholly without jurisdiction. I thereupon denied said motion to dismiss, and counsel for said alleged bankrupt, said Frederic L. Grant Shoe Company thereupon then and there duly excepted to such ruling.

I further certify that upon the trial which followed the denial of said motion, there was no testimony offered upon the part of said alleged bankrupt. Said petitioning creditor, said W. M. Laird Company, proceeded to establish its claim for damages sustained on account of the alleged breach of warranty which accompanied the sale of personal property, and said claim was then and there established at the sum of three thousand four hundred fifty-four dollars, ($3,454.00).

I hereby certify that said question of jurisdiction was the only question in issue herein and that at the termination of the testimony offered by said petitioner herein, I directed a verdict establshing said petitioner's claim at the amount above stated, and adjudging that said Frederic L. Grant Shoe Company was a bankrupt.

This certificate is made conformably to the Act of Congress of March 3rd, 1891, Chapter 517, and said question of jurisdiction is the only question certified by me under this certificate to the Supreme Court.

Dated June 7, 1905.

JOHN R. HAZEL,
United States District Judge for the Western District of New York.

Endorsed: No. 1502. United States District Court, Western District of New York. In the matter of Frederic L. Grant Shoe Com-

pany, Bankrupt. In Bankruptcy No. 1502. Certificate of Jurisdictional question involved. Filed Jun- 8, 1905. At — o'c- — M. Sidney W. Petrie, Clerk.

42 United States District Court, Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, a Bankrupt. No. 1502.

A writ of error having been allowed in the above entitled matter, the following facts are hereby stipulated by the attorneys for the parties thereto:

First. That after the commencement of bankruptcy proceedings herein by the filing of the petition of said W. M. Laird Company, petitioner, and the service of the subpœna herein upon said Frederic L. Grant Shoe Company, a motion was made in the United States District Court for the Western District of New York herein by said Frederic L. Grant Shoe Company to dismiss said petition and proceeding for want of jurisdiction in said Court and upon the same grounds as those upon which the motion to dismiss was made at the trial herein.

Second. Said motion was opposed by said petitioner, said W. M. Laird Company, and resulted in an order of said United States District Court for the Western District of New York denying said motion, which order was entered on the 2nd day of September, 1903, and which decision is reported in 11 Am. Bkr. Rep. 48, and 125 Fed. Rep. 576.

43 Third. That thereafter said decision of said United States District Court for the Western District of New York was by petition for review by said Frederic L. Grant Shoe Company brought into the United States Circuit Court of Appeals for the Second Circuit, and after hearing argument by counsel for both parties, was by said Court affirmed on the 21st day of April, 1904, which decision is reported in 12 Am. Bkr. Rep. 349, and 130 Fed Rep. 881.

This stipulation is to be filed in the office of the Clerk of the United States District Court for the Western District of New York, and made a part of the record herein, and a transcript hereof is to be by him remitted to the United States Supreme Court in response to said writ of error as a part of the record herein.

Dated February 9th, 1907.

SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Frederic L. Grant Shoe Company, Bankrupt, Plaintiff in Error.

McGUIRE & WOOD,
Attorney for W. M. Laird Company, Petitioner, Defendant in Error.

Endorsed: U. S. District Court, Western District of N. Y. In the Matter of Frederic L. Grant Shoe Company, a Bankrupt. Stipula-

tion. Satterlee, Bissell, Taylor & French, Attorneys for Bankrupt, Office and Post Office Address, 9th Floor German Insurance Building, Rochester, N. Y. Filed Feb. 11 1907 at — o'c. — M. Sidney W. Petrie, Clerk.

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to W. M. Laird Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in the City of Washington, in the District of Columbia, within thirty days of the date hereof, pursuant to the writ of error filed in the Clerk's Office of the District Court of the United States for the Western District of New York, wherein the Frederic L. Grant Shoe Company, Bankrupt, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand, at the City of Buffalo, in the District above named, this 6th day of February, in the year of our Lord one thousand nine hundred and seven.

JOHN R. HAZEL,
United States District Judge for the Western District of New York.

We hereby, this 9th day of February, 1907, at the City of Rochester, Monroe County, New York, admit personal service of the foregoing citation and of the writ of error herein, therein referred to, dated February 6th, 1907, on behalf of W. M. Laird Company of Pittsburg, Pennsylvania, defendant in error.

McGUIRE & WOOD,
Attorneys for W. M. Laird Company, Defendant in Error.

45 [Endorsed:] U. S. District Court, Western District of N. Y. In the Matter of Frederic L. Grant Shoe Company, An Alleged Bankrupt. Citation. Satterlee, Bissell, Taylor & French Attorneys for said Bankrupt. Office and Post Office Address 9th Floor German Insurance Building Rochester, N. Y. Filed Feb. 11 1907 at — o'c. — M. Sidney W. Petrie, Clerk.

46 Know all men by these presents:

That, the undersigned, the Aetna Indemnity Company, a corporation duly authorized to enter into bonds as surety, is held and firmly bound unto W. M. Laird Company, of Pittsburg, Pa., in the full and just sum of two hundred and fifty dollars ($250.00), to be paid to said W. M. Laird Company, its certain attorneys, successors or assigns, to which payment well and truly to be made the said Aetna Indemnity Company binds itself and its successors, by these presents: Sealed with the seal of the said Aetna Indemnity Company and dated this 17th day of January, 1907.

Whereas, lately at a District Court of the United States for the Western District of New York, in a certain proceeding in bankruptcy in said Court then pending in said Court, wherein said W. M. Laird Company of Pittsburg, Pa., was petitioner, and said Frederic L. Grant Shoe Company was named as an alleged bankrupt, a decree and judgment adjudicating that said Frederic L. Grant Shoe Company was a bankrupt was rendered against said Frederic L. Grant Shoe Company, and the said Frederic L. Grant Shoe Company having obtained a writ of error, and filed a copy thereof in the Clerk's Office of said Court to reverse the judgment in the aforesaid proceeding, and a citation having issued directed to the said W. M. Laird Company citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington within thirty days from date.

Now the condition of the above obligation is such that if
47 the said Frederic L. Grant Shoe Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

THE AETNA INDEMNITY COMPANY,
WILIAM B. FARNHAM,
Resident Vice-President.

Attest:
BENJ. B. CHACE,
Resident Assistant Secretary.

[Seal of Aetna Indemnity Company.]

48 STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 17th day of January 1907, before me personally appeared William B. Farnham, Resident Vice-President of The Aetna Indemnity Company at the City of Rochester, N. Y., with whom I am personally acquainted, who being by me duly sworn said: that he resides in the State of New York; that he is a Resident Vice-President of the Aetna Indemnity Company at the City of Rochester, N. Y., the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said Company; that the seal affixed to the foregoing instrument is such seal, and that it was so affixed by the order of the Board of Directors of said Company, and that he signed his name thereto as Resident Vice-President by like authority.

And the said William B. Farnham, further says that he is acquainted with Benj. B. Chace, and knows him to be a Resident Assistant Secretary of the said Company; that the signature of the said Benj. B. Chace, subscribed to the within instrument is in the genuine handwriting of the said Benj. B. Chace, and was thereto subscribed by the like order of said Board of Directors and in the presence of him the said William B. Farnham.

CHANDLER WOLCOTT,
Notary Public.

At a meeting of the Board of Directors of the Aetna Indemnity Company duly called and held on the 12th day of April,
49 1906, a quorum being present, on motion it was

Voted: That Eugene H. Satterlee, Joseph W. Taylor and W. B. Farnham, be appointed Resident Vice-Presidents at Rochester, N. Y.

Voted: That Benjamin B. Chace, Chandler Wolcott and James McAuliffe be appointed Resident Assistant Secretaries at Rochester, N. Y.

Voted: That Eugene H. Satterlee, Joseph W. Taylor and W. B. Farnham, Resident Vice-Presidents, be and each one of them is hereby authorized and empowered to execute and deliver and attach the seal of the Company to any and all bonds and undertakings for or on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by Benjamin B. Chace, Chandler Wolcott or James McAuliffe, Resident Assistant Secretaries.

[Seal of Chandler Wolcott, Notary Public, Monroe County, N. Y.]

STATE OF NEW YORK, *County of New York, ss:*

I, Charles I. Brooks, Secretary of the Aetna Indemnity Company, have compared the foregoing votes with the originals thereof, as recorded in the minute book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original votes.

Given under my hand and the seal of the Company at the City of New York, N. Y., this 5th day of Jan. 1907.

CHARLES I. BROOKS,
Secretary.

[Seal of the Aetna Indemnity Company, Hartford, Connecticut.]

50 Endorsed: No. 1502. U. S. District Court, Western District of N. Y. In the Matter of Frederic L. Grant Shoe Company, An Alleged Bankrupt. Bond. Satterlee, Bissell, Taylor & French, Attorneys for said Bankrupt. Office and Post Office Address, 9th Floor German Insurance Building, Rochester, N. Y. Approved as to form & sufficiency of surety Feb'y 6, 1907. John R. Hazel, U. S. J. Filed Feb. 6, 1907. At — o'c- — M. Sidney W. Petrie, Clerk.

51 United States District Court for the Western District of New York.

In the Matter of FREDERIC L. GRANT SHOE COMPANY, Bankrupt, Plaintiff in Error.

vs.

W. M. LAIRD COMPANY, Petitioner, Defendant in Error.

To the Clerk:

You are requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to a writ of error allowed herein, and to include in such transcript of record the following and no other papers, to wit:

First. Subpœna.
Second. Petition in Bankruptcy.
Third. Answer of alleged bankrupt.
Fourth. Judgment of Adjudication of Bankruptcy.
Fifth. Findings of fact and conclusions of law.
Sixth. Opinion of Hon. John R. Hazel, District Judge.
Seventh. Assignment of errors filed June 8, 1905.
Eighth. Assignment of errors filed Feb. 6, 1907.
Ninth. Petition for writ of error.
Tenth. Order allowing writ of error.
Eleventh. Writ of error.
Twelfth. Certificate of jurisdictional question involved filed June 8, 1905.

52 Thirteenth. Stipulation dated February 9th, 1907.
Fourteenth. Citation dated February 6th, 1907, and admission of service.
Fifteenth. Bond filed February 6th, 1907.
Sixteenth. Præcipe for transcript.
Seventeenth. Certificate to correctness of transcript of record.

Dated Rochester, N. Y., February 9th, 1907.

Yours, etc.,

SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Above Named Bankrupt, Plaintiff in Error.

Endorsed: U. S. District Court, Western District of N. Y. In the Matter of Frederic L. Grant Shoe Company, Bankrupt, Pl'ff in Error, *vs.* W. M. Laird Company, petitioner, Def't in Error. Præcipe for Transcript. Satterlee, Bissell, Taylor & French, Attorneys for Pl'ff in Error, Office and Post Office Address, 9th Floor German Insurance Building, Rochester, N. Y. Filed Feb. 11 1907 At — o'c — M. Sidney W. Petrie, Clerk.

53 UNITED STATES OF AMERICA,
Western District of New York, ss:

I, Sidney W. Petrie, Clerk of the District Court of the United States of America for the Western District of New York, do hereby certify that the foregoing pages numbered from 1 to 52, inclusive, contain a true copy of the record of the Assignment of Errors and of all proceedings in the case, tried in the United States District Court for the Western District of New York, herein, entitled Frederic L. Grant Shoe Company, Bankrupt, Plaintiff in Error, against W. M. Laird Company of Pittsburg, Pa., Defendant in Error, as the same remain of record and on file in my office.

[Seal United States District Court, Western District of New York.]

In testimony whereof, I have caused the seal of this Court to be hereunto affixed at the City of Buffalo, in the Western District of New York, this 2d day of March in the year of our Lord one thousand, nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

SIDNEY W. PETRIE, *Clerk.*

Endorsed on cover: File No. 20,604. W. New York D. C. U. S. Term No. 250. Frederic L. Grant Shoe Company, bankrupt, plaintiff in error, *vs.* W. M. Laird Company, of Pittsburg, Pa. Filed March 9th, 1907. File No. 20,604.

Office Supreme Court, U. S.
OCT 14 1907
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

October Term, 1907, No. 250 **35.**

FREDERIC L. GRANT SHOE COMPANY

Plaintiff in Error,

against

W. M. LAIRD COMPANY OF PITTSBURGH, PA.

Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR

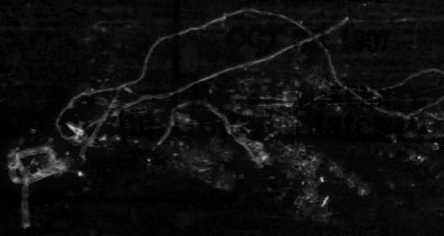
McGUIRE & WOOD,

Attorneys for Defendant in Error,

Rochester, N. Y.

shoe company amounting in the aggregate to more than five hundred dollars. The nature of the claim was one for unliquidated damages aggregating $3,732.80, asserted to have been suffered by reason of breaches of an alleged express warranty in the sale of merchandise. The alleged bankrupt answered, denying its insolvency and the commission of any of the acts of bankruptcy averred in the petition, and demanded a trial by jury of the said issues. It also denied being indebted in any amount to the petitioner. Soon afterwards a motion was made to dismiss the petition on the ground that, because of the nature of the claim held by the Laird Company, that company was not a creditor and the holder of a provable claim for any amount against the shoe company within the meaning of Subdivision "B" of section 19 of the Bankruptcy Act, and consequently, was not entitled to file a petition in bankruptcy against the alleged debtor. The motion to dismiss was denied by the district judge. (*125 Fed. 576*). In the order entered, it was directed that the claim of the petitioner be liquidated by the jury at the jury trial demanded by the alleged bankrupt for the determination of the issues as to insolvency and the commission of acts of bankruptcy. On the petition of the alleged bankrupt to review this order it was affirmed by the Circuit Court of Appeals for the Second Circuit. (*130 Fed. 881*) A trial was then had. The amount of the claim of the petitioner was liquidated at the sum of $3,454.00, and the shoe company adjudicated a bankrupt. An appeal was then taken to this court which was dismissed upon the ground that the records should have been brought to this Court by writ of error, and not by appeal. (*17 A. B. R. 1*). Whereupon the shoe company sued out a writ of error and the same was allowed by the district judge on the 6th day of February, 1907. The judgment sought to be reviewed by the writ of error herein was entered by the District Court on the 8th day of June, 1905, a period of one year and eight months having elapsed from the entry of the judgment to the date of the writ of error.

HIRAM R. WOOD,
of counsel for defendant in error
for the purposes of this motion.



Supreme Court of the United States.

OCTOBER TERM, 1907. NO. 250.

FREDERIC L. GRANT SHOE COMPANY,
Plaintiff in Error,

vs.

W. M. LAIRD COMPANY of Pittsburg, Pa.
Defendant in Error.

Brief for Plaintiff in error on motion to dismiss writ of error.

This motion is made upon two grounds.

First. That the writ of error was not sued out in time.

Second. Because there is no bill of exceptions.

FIRST.

THE WRIT OF ERROR WAS SUED OUT IN TIME.

The judgment of the United States District Court, Western District of New York, sought to be reviewed was granted on May 18th, 1905 (Record page 8) and was entered in the clerk's office June 8, 1905 (Record page 9). The order of the District Judge allowing the writ of error was granted February 6, 1907 (Record page 16) and the writ of error was issued the same day (Record page 17). The writ of error was sued out within two years after the entry of the judgment.

The writ of error presents a question of jurisdiction of the District Court arising under the Bankruptcy Act of July 1st, 1898

(Record pages 17 and 18) and after final judgment is well taken at any time within two years under the provisions of the fifth section of the Judiciary Act of March 3, 1891.

Judiciary Act of March 3, 1891, section 5 (26 Stat. at L. 826, chap. 517; U. S. Comp. Stat. 1901, p. 549.)
Revised Statutes section 1008 (U. S. Comp. Stat. 1901, p. 715.)

The Judiciary Act of March 3, 1891, section 5, provides "that appeals or writs of error may be taken from the district courts" * * * "direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue;" * * * and section 1008 of the Revised Statutes provides that no judgment of a District Court shall be reviewed in the Supreme Court on writ of error unless the writ of error is brought within two years after the entry of such judgment.

It has been claimed that the provisions of the last paragraph of section 6 of the Act of March 3, 1901 (26 Stat. at L. 826) changed the limit of time from two years to one year as to writs of error from the Supreme Court to all the courts of the United States, but this question has been set at rest by the decisions of this court to the effect that the limitation of one year applies only to the Circuit Court of Appeals and as to the Circuit Courts and District Courts the limitation of two years remained unchanged.

Allen v. Southern Pacific R. Co. 173 U. S. 479, 486.
Holt v. Indiana Mfg. Co. 176 U. S. 70.
Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 285.

In the brief for defendant in error (page 3 & 4) it is suggested that "appeals" and "writs of error" are synonomous terms and consequently (page 5) that the limitation of thirty days found in General Orders in Bankruptcy No. 36 applies. The decision of this Court in this case shows counsel for defendant in error to be mistaken in the first proposition because an appeal was dismissed herein on the ground that writ of error was the only method of bringing this case to this Court.

Grant Shoe Co. v Laird Co. 203 U. S. 502.

And of course all will concede that an Act of Congress cannot be repealed by an order in Bankruptcy.

SECOND.

A BILL OF EXCEPTIONS IN NOT NECESSARY IN THIS CASE.

The writ of error is granted solely for want of jurisdiction in the District Court (Record pages 17 and 18) which question of jurisdiction appears on the face of the petition in Bankruptcy (Record pages 1, 2, and 3.) Under these circumstances this court will examine the certificate of the District Judge for the purpose of ascertaining when and how the question of jurisdiction arose and will then examine the record to determine whether or not the District Court had jurisdiction This precise question was decided by this Court in December, 1906.

C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278.

Counsel for the plaintiff in error are not unmindful of the suggestion made by Mr. Justice White in the case last cited to the effect that it is better practice in every case of direct review on a question of jurisdiction to make apparent on the record by a bill of exceptions the fact that the question of jurisdiction was raised and passed upon. This course would doubtless have been taken in this case had counsel not mistaken their remedy and brought appeal instead of writ of error which this court held to be wrong.

Grant Shoe Co. v. Laird Co. 203 U. S. 502.

Under these circumstances we rely with confidence upon the decision of this court in *Nichols Lumber Co. v. Franson, 203 U. S. 278,* as holding that while a bill of exceptions may be desirable it is not here necessary. As stated by Mr. Justice White in that case this court has frequently held that it is its duty "without action of the trial court or of the parties to look at the record to determine whether or not the court below had jurisdiction."

The certificate of the District Judge (Record pages 17 and 18) shows how this jurisdictional question was raised, the disposition of the question made by the court and the fact that counsel for the plaintiff in error then and there excepted to the ruling of the court.

The question of whether the record shows jurisdiction appears upon the face of the record. We are thus brought squarely within the de-

cision in *C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278,* which it is submitted is conclusive upon this motion.

See also

St. Paul M. & M. Ry. Co. v. Drake, 72 Fed. Rep. 945.
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Young v. Martin, 75 U. S. 354.
Thomas v. Ohio State University Trustees, 195 U. S. 207, 211.

THIRD.

THE PLAINTIFF IN ERROR IS NOT CONCLUDED BY THE DECISION OF THE CIRCUIT COURT OF APPEALS UPON THE PETITION FOR REVIEW OF THE ORDER OF THE DISTRICT COURT DENYING THE ORIGINAL MOTION TO DISMISS.

This question is not one of those stated as a ground for this motion and is not discussed in the brief of counsel for defendant in error. This point is made however in view of the fact that the question is suggested, though not considered, in the opinion of Mr. Justice White handed down at the time of the dismissal of the appeal herein.

Grant Shoe Co. v. Laird Co. 203 U. S. 502.

For the proper consideration of this question it is necessary to see how the question arose on the original motion to dismiss and how it came before the Circuit Court of Appeals. The history of this matter may be found at page 19 of the record. Before the trial and soon after the filing the petition in bankruptcy herein the plaintiff in error moved in the District Court to dismiss for want of jurisdiction. That motion was by the District Court denied on Sept. 2, 1903. (Record page 19.) The decision of that motion was by petition for review under section 24 (b) of the Bankruptcy Act of July 1st, 1898, (30 Stat. at L. 554. chap. 541) brought into the Circuit Court of Appeals for the Second Circuit and was there by order on April 21st, 1904, affirmed. (Record page 19.) The whole case was never taken to the Circuit Court of Appeals, and neither appeal or writ of error

would lie from either of those orders because they were not final orders and because they were both before the final judgment herein.

Bardes v. First National Bank, 175 U. S. 526.

Neither of those decisions were in the nature of a judgment or decree, but both were simply interlocutory orders, one, that of the District Court denying a motion to dismiss, the other, that of the Circuit Court of Appeals affirming the order which denied the motion to dismiss. The decision of the Circuit Court of Appeals upon the petition for review is reported in

130 Fed. Rep. 881.

The trial herein occurred in May, 1905 (Record page 17) and the judgment adjudicating plaintiff in error a bankrupt and which is sought to be reviewed by this writ of error was entered June 8th, 1905 (Record page 9).

The provisions of the Judiciary Act of March 3, 1891 (26 Stat. at L. 826, chap. 517) which relate to finality of the decisions of the Circuit Court of Appeals are found in section six. It is there provided that those courts shall exercise appellate jurisdiction "to review by appeal or writ of error final decision of the District Courts" and that the *"judgments and decrees"* of the Circuit Courts of Appeals shall be final in all cases where jurisdiction depends upon diverse citizenship, in cases arising under the patent laws, the revenue laws, criminal laws and in admiralty cases.

The order of the Circuit Court of Appeals on the petition to review was not a "judgment or decree." The petition for review was not taken under the provisions of the Judiciary Act, but was taken under the provisions of the Bankruptcy Act. And this case is not included in any of the cases made final by the Judiciary Act, that is, jurisdiction of the District Court did not depend upon diverse citizenship, and this case did not arise under the patent laws, the revenue laws, the criminal laws, or in admiralty.

Consequently the decisions of this court with reference to finality of the "judgments and decrees" of the Circuit Courts of Appeals which are cited below have no application to this case. The effect of these decisions is that the Judiciary Act does not contemplate several separate appeals or writs of error on the merits at the same time to two appellate courts. That the whole case after final judgment, where the decisions of the Circuit Court of Appeals are made final, cannot

be taken to the Circuit Court of Appeals and to this court. Nothing of that kind is attempted here. This is the first review of the final judgment sought herein, except that sought by appeal to this court which was dismissed on the ground that writ of error is the proper remedy.

The cases in this court above referred to are:

McLish v. Roff, 141 U. S. 661.
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It will be noticed that in all these cases where the judgment or decree of the Circuit Court of Appeals is held to be final there had been a final judgment or final order in the lower court which was passed upon by the Circuit Court of Appeals and judgment rendered by it upon the whole case. That is the distinction between these cases and the case at bar, and further, this case does not fall within the description of those referred to in the Judiciary Act with reference to finality.

It is submitted that the motion should be denied.

SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Plaintiff in Error,
Rochester, N. Y.

P. M. FRENCH,
Of Counsel.

FILED
MAR 30 1907
JAMES H. McKENNEY,

Supreme Court of the United States

October Term, 1907. No. 35.

FREDERIC L. GRANT SHOE COMPANY,
Plaintiff in Error,

against

W. M. LAIRD COMPANY OF PITTSBURGH, PA.,
Defendant in Error.

In Error to the United States District Court, Western District of New York.

BRIEF FOR PLAINTIFF IN ERROR.

SATTERLEE, PISSELL, TAYLOR & FRENCH,
Attorneys for Plaintiff in Error,
Rochester, N. Y.

Supreme Court of The United States.

OCTOBER TERM, 1907. No. 250.

FREDERIC L. GRANT SHOE COMPANY,
Plaintiff in error.

vs.

W. M. LAIRD COMPANY, of Pittsburg, Pa.
Defendant in Error.

In error to United States District Court, Western District of New York, to review a judgment which on June 8th, 1905, adjudged the plaintiff in error a bankrupt.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

On November 4th, 1907, this court postponed the hearing upon motion of defendant in error to dismiss until this time.

The motion was made upon two grounds—

First, That the writ of error was not sued out in time.

Second, Because there is no bill of exceptions.

The question presented by the writ of error attacks the jurisdiction of the District Court and is whether an unliquidated and disputed claim, based upon damages sustained upon the breach of warranty, which accompanied the sale of personal property, will support a petition in bankrutcy.

The ~~defendant~~ plaintiff in error has only two creditors, namely, the ~~plaintiff~~ defendant in error and The German-American Bank of Rochester, N. Y. (record page 11).

On July 15th (record pages 5 and 10) W. M. Laird Company, said defendant in error, a corporation organized under the laws of the State of New Jersey, having its principal place of business at Pittsburg, Pa. (record page 1) filed in the office of the Clerk of the United States District Court for the Western District of New York, its petition, signed by itself alone (record pages 1–3 and 9) asking that the Frederic L. Grant Shoe Company, said plaintiff in error, a manufacturing corporation, having its principal place of business at Rochester, New York, (record page 1) be adjudged a bankrupt. The claim of said defendant in error, upon which said petition in bankruptcy is founded, is based wholly upon an unliquidated demand for damages, sustained by reason of an alleged breach of warranty claimed to have accompanied the sale of personal property, (record pages 1, 3 and 10). A subpoena issued out of the District Court, together with the petition referred to, was served upon said plaintiff in error on July 18th, 1903 (record page 4). On July 28th, 1903, (record pages 7 and 11) said plaintiff in error filed in the office of the Clerk of said District Court, its answer (record pages 5, 6, 7 and 8), wherein it denies the giving of the warranty and its breach. The claim, which is the basis of the petition in bankruptcy, is therefore not only unliquidated but disputed.

When the proceeding was reached for trial upon the petition and answer, said plaintiff in error, at the opening of the hearing, moved to dismiss said petition and said proceeding upon the ground that said District Court had no jurisdiction to entertain said proceeding or render a decree or order an adjudication of bankruptcy against said plaintiff in error (record pages 11 and 17). The reasons stated why said District Court had no jurisdiction of said proceeding were that said defendant in error, at the time of filing its petition herein, had no provable claim against said plaintiff in error to the extent of five hundred dollars ($500) or any other sum, and had no standing in Court to ask that said plaintiff in error be adjudged a bankrupt; that the claim of said defendant in error was based wholly upon damages alleged to have been sustained by it by reason of a pretended breach of a warranty which accompanied the sale of personal property, which damages had never been in any way liquidated, and the pretended facts upon which said damages were based were, by the answer,

denied; that under the Bankruptcy Act of 1898, there was no possible way for said defendant in error's claim in bankruptcy to become liquidated, except pursuant to the provisions of section 63b, which provides for liquidating unliquidated claims in such manner as the Court shall direct, and that thereafter such claims may be proved and allowed against the estate; that the statute plainly shows the intention that there shall first be an adjudication in bankruptcy before such unliquidated and disputed claim can be in any manner proved (record pages 17 and 18).

At the time of making said motion The German-American Bank of Rochester the only other creditor of said plaintiff in error (record page 10) appeared by its counsel and united in said motion (record page 11). Said motion was, by the court, denied, to which ruling counsel for plaintiff in error then and there duly excepted (record page 18).

Upon the trial, which followed the denial of said motion, there was no testimony offered on the part of said plaintiff in error. Said defendant in error proceeded to establish its claim for said damages and it was established at the sum of three thousand four hundred and fifty-four dollars ($3,454) (record page 18). The fact of insolvency and the commission of an act of bankruptcy on the part of said plaintiff in error was, in open Court, admitted, and the Court thereupon adjudged that said plaintiff in error was a bankrupt (record pages 11, 8 and 9). The Court thereafter made and filed its findings of fact and conclusions of law (record pages 9, 10, 11 and 12) and said plaintiff in error, feeling aggrieved by said judgment, filed assignments of error (record pages 13 and 14) together with its petition for writ of error (record page 15), which was allowed by the Judge of the District Court (record page 16), and the jurisdictional question referred to is duly certified to this court (record pages 17 and 18).

SPECIFICATION OF ERROR RELIED UPON.

The court below erred in denying the motion of plaintiff in error, made at the commencement of the hearing, to dismiss the proceeding for want of jurisdiction (record pages 11, 17 and 18) because an unliquidated and disputed claim, based upon damages sustained upon the breach of warranty which accompanied the sale of personal property, will not support a petition in bankruptcy.

This question is raised by exception to the court's ruling (record page 18), by the assignments of error (record pages 13 and 14), the allowance of the writ of error (record page 16), and by the certificate of said jurisdictional question to this court (record pages 17 and 18).

Argument.

FIRST.

THE WRIT OF ERROR WAS SUED OUT IN TIME.

The judgment of the United States District Court, Western District of New York, sought to be reviewed was granted on May 18th, 1905 (Record page 8) and was entered in the clerk's office June 8, 1905 (Record page 9.) The order of the District Judge allowing the writ of error as granted February 6, 1907 (Record page 16) and the writ of error was issued the same day (Record page 17). The writ of error was sued out within two years after the entry of the judgment.

The writ of error presents a question of jurisdiction of the District Court arising under the Bankruptcy Act of July 1st, 1898 (Record pages 17 and 18) and after final judgment is well taken at any time within two years under the provisions of the fifth section of the Judiciary Act of March 3, 1891.

Judiciary Act of March 3, 1891, section 5 (26 Stat. at L. 826, chap. 517; U. S. Comp. Stat. 1901, p. 549.)
Revised Statutes section 1008 (U. S. Comp. Stat. 1901, p. 715.)

The Judiciary Act of March 3, 1891, section 5, provides "that appeals or writs of error may be taken from the district courts" * * * "direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue;" * * * and section 1008 of the Revised Statutes provides that no judgment of a District Court shall be reviewed in the Supreme Court on writ of error unless the writ of error is brought within two years after the entry of such judgment.

It has been claimed that the provisions of the last paragraph of section 6 of the Act of March 3, 1901 (26 Stat. at L. 826) changed the limit of time from two years to one year as to writs of error from the Supreme Court to all the courts of the United States, but this question has been set at rest by the decisions of this court to the effect that the limitation of one year applies only to the Circuit Court of Appeals and as to the Circuit Courts and District Courts the limitation of two years remained unchanged.

Allen v. Southern Pacific R. Co. 173 U. S. 479, 486.
Holt v. Indiana Mfg. Co. 176 U. S. 70.
Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 285.

Upon the motion to dismiss the writ of error herein defendant in error suggested that "appeals" and "writs of error" are synonomous terms and consequently that the limitation of thirty days found in General Orders in Bankruptcy No. 36 applies. The decision of this Court in this case shows counsel for defendant in error to be mistaken in the first proposition because an appeal was dismissed herein on the ground that writ of error was the only method of bringing this case to this Court.

Grant Shoe Co. v. Laird Co. 203 U. S. 502.

And of course all will concede that an Act of Congress cannot be repealed by an order in Bankruptcy.

The power to make rules contained in the Bankruptcy Act of July 1, 1898, section 30, (30 Stat. at L. 554, chap. 541; U. S. Comp. Stat. 1901, p. 3434) is as follows:

"Sec. 30, rules, forms and order—a. All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed and may be amended from time to time by the Supreme Court of the United States."

Of course the power to make rules as to procedure and for carrying the Bankruptcy Act into force and effect, does not include the power to limit the time within which writ of error must be sued out, as is provided by the Judiciary Act and by Sec. 1008 of the Revised Statutes. as was said by Mr. Justice White in *George M. West Co. v. Lea Brothers & Co. 174 U. S. 590,* at page 599: "These rules were but intended to execute the Act and not to add to its provisions * * *."

SECOND.

A BILL OF EXCEPTIONS IS NOT NECESSARY IN THIS CASE.

The writ of error is granted solely for want of jurisdiction in the District Court (Record pages 17 and 18) which question of jurisdiction appears on the face of the petition in Bankruptcy (Record pages 1, 2, and 3.) Under these circumstances this court will examine the certificate of the District Judge for the purpose of ascertaining when and how the question of jurisdiction arose and will then examine the record to determine whether or not the District Court had jurisdiction. The precise question was decided by this Court in December 1906.

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Counsel for the plaintiff in error are not unmindful of the suggestion made by Mr. Justice White in the case last cited to the effect that it is better practice in every case of direct review on a question of jurisdiction to make apparent on the record by a bill of exceptions the fact that the question of jurisdiction was raised and passed upon. This course would doubtless have been taken in this case had counsel not mistaken their remedy and brought appeal instead of writ of error which this court held to be wrong.

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Under these circumstances we rely with confidence upon the decision of this court in *Nichols Lumber Co. v. Franson, 203 U. S. 278,* as holding that while a bill of exceptions may be desirable it is not here necessary. As stated by Mr. Justice White in that case this court has frequently held that it is its duty "without action of the trial court or of the parties to look at the record to determine whether or not the court below had jurisdiction."

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the face of the record. We are thus brought squarely within the decision in *C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278*, which it is submitted is conclusive upon this motion.

See also

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THIRD.

THE PLAINTIFF IN ERROR IS NOT CONCLUDED BY THE DECISION OF THE CIRCUIT COURT OF APPEALS UPON THE PETITION FOR REVIEW OF THE ORDER OF THE DISTRICT COURT DENYING THE ORIGINAL MOTION TO DISMISS.

This question is not one of those stated as a ground for the motion. This point is made in view of the fact that the question is suggested, though not considered, in the opinion of Mr. Justice White handed down at the time of the dismissal of the appeal herein.

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For the proper consideration of this question it is necessary to see how the question arose on the original motion to dismiss and how it came before the Circuit Court of Appeals. The history of this matter may be found at page 19 of the record. Before the trial and soon after the filing the petition in bankruptcy herein the plaintiff in error moved in the District Court to dismiss for want of jurisdiction. That motion was by the District Court denied on Sept. 2, 1903. (Record page 19.) The decision of that motion was by petition for review under section 24 (b) of the Bankruptcy Act of July 1st, 1898, (30 Stat. at L. 554, chap. 541) brought into the Circuit Court of Appeals for the Second Circuit and was there by order on April 21st,

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Neither of those decisions were in the nature of a judgment or decree, but both were simply interlocutory orders, one, that of the District Court denying a motion to dismiss, the other, that of the Circuit Court of Appeals affirming the order which denied the motion to dismiss. The decision of the Circuit Court of Appeals upon the petition for review is reported in

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The trial herein occurred in May, 1905 (Record page 17) and the judgment adjudicating plaintiff in error a bankrupt and which is sought to be reviewed by this writ of error was entered June 8th, 1905 (Record page 9).

The provisions of the Judiciary Act of March 3, 1891 (26 Stat. at L. 826, chap. 517) which relate to finality of the decisions of the Circuit Court of Appeals are found in section six. It is there provided that those courts shall exercise appellate jurisdiction "to review by appeal or writ of error final decision of the District Courts" and that the "*judgments and decrees*" of the Circuit Courts of Appeals shall be final in all cases where jurisdiction depends upon diverse citizenship, in cases arising under the patent laws, the revenue laws, criminal laws and in admiralty cases.

The order of the Circuit Court of Appeals on the petition to review was not a "judgment or decree." The petition for review was not taken under the provisions of the Judiciary Act, but was taken under the provisions of the Bankruptcy Act. And this case is not included in any of the cases made final by the Judiciary Act, that is, jurisdiction of the District Court did not depend upon diverse citizenship, and this case did not arise under the patent laws, the revenue laws, the criminal laws, or in admiralty.

Consequently the decisions of this court with reference to finality of the "judgments and decrees" of the Circuit Courts of Appeals which are cited below have no application to this case. The effect of

these decisions is that the Judiciary Act does not contemplate several separate appeals or writs of error on the merits at the same time to two appellate courts. That the whole case after final judgment, where the decisions of the Circuit Court of Appeals are made final, cannot be taken to the Circuit Court of Appeals and to this court. Nothing of that kind is attempted here. This is the first review of the final judgment sought herein, except that sought by appeal to this court which was dismissed on the ground that writ of error is the proper remedy.

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It will be noticed that in all these cases where the judgment or decree of the Circuit Court of Appeals is held to be final there had been a final judgment or final order in the lower court which was passed upon by the Circuit Court of Appeals and judgment rendered by it upon the whole case. That is the distinction between these cases and the case at bar, and further, this case does not fall within the description of those referred to in the Judiciary Act with reference to finality.

FOURTH.

THIS WRIT OF ERROR WHICH PRESENTS A QUESTION OF JURISDICTION OF THE DISTRICT COURT ARISING UNDER THE BANKRUPTCY ACT OF JULY 1st, 1898, IS AFTER FINAL JUDGMENT WELL TAKEN UNDER THE PROVISIONS OF THAT ACT AND THE FIFTH SECTION OF THE JUDICIARY ACT OF MARCH 3d, 1891.

Bankruptcy act of July 1st, 1898, sections 24 and 25 (30 Stat. at L. 554, chap. 541, U. S. Comp. Stat. 1901, pp. 3431 and 3432).
Judiciary Act of March 3, 1891, section 5 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549).
U. S. v. Jahn, 155 U. S. 109, 114, 115.
Barders vs. First National Bank, 175 U. S. 526.
Frederic L. Grant Shoe Company v. W. M. Laird Co. 203 U. S. 502.

FIFTH.

AN UNLIQUIDATED AND DISPUTED CLAIM, BASED UPON DAMAGES SUSTAINED UPON THE BREACH OF WARRANTY, WHICH ACCOMPANIED THE SALE OF PERSONAL PROPERTY WILL NOT SUPPORT A PETITION IN BANKRUPTCY. THE DISTRICT COURT HAD NO JURISDICTION TO ADJUDGE PLAINTIFF IN ERROR A BANKRUPT.

The provisions of the bankruptcy act of 1898 which are applicable to the question presented (30 Stat. at L. 554, chap. 541, U. S. Comp. Stat. 1901, pp. 3445 and 3447) are as follows:

"Section 59. Who may file and dismiss petitions.— * * * (*b*) Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

"Section 63. Debts which may be proved.—(*a*) Debts of the bank-

rupt may be proved and allowed against his estate which are * * *

"(4) Founded upon an open account or upon a contract express or implied. * * *.

"(*b*) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

In this case, the claim, which is the basis of the petition in bankruptcy, is unliquidated and disputed, and therefore, at the time of filing and serving the petition, it was not provable. The language of the statute is that an unliquidated claim may be liquidated as directed by the court and may *thereafter*, that is, after such liquidation, be proved. There must first be some proceeding in court in which the application for liquidation may be made, before such claim can become liquidated. No one can file a petition in bankruptcy unless he has, at the time of filing, a provable claim. The fact that he alleges a claim, which may by some subsequent proceeding or action become liquidated and undisputed, and thus provable, does not make him a creditor with a provable claim until such steps are taken. When the time arrives for application for liquidation, the court may decide that he has no claim. It may decide that the statement of facts presented by him is not substantiated by proof. In this case, there being less than twelve creditors, one creditor, whose claim equals five hundred dollars, may file a petition. His claim, however, must be provable, and it must amount at least to five hundred dollars. Until it is liquidated, who is to determine whether it amounts to as much as five hundred dollars? Is it sufficient that a creditor alleges that to be the fact? Upon liquidation the court may decide that the claim amounts to less than five hundred dollars. If the creditor is to decide this matter for himself, it would seem there could be no necessity for the provision for the law for liquidation. If he can determine that his claim amounts to more than five hundred dollars, why may he not fix the exact amount?

The question as to what constitutes a provable claim in involuntary petitions in bankruptcy, has been much discussed. It has been held that unliquidated claims based upon tort will not sustain a petition.

Beers v. Hamlin, 3 Am. Bkr. Rep. 745, 99 Fed. Rep. 695.

In re Brinckmann, 4 Am. Bkr. Rep. 551, 103 Fed. Rep. 65.

The same proposition with reference to actions for breach of warranty has been held in Florida and in Pennsylvania.

In *re Morales* (5 Am. Bkr. Rep. 425, 105 Fed. Rep. 761), was decided in January, 1901, by the United States District Court for the Southern District of Florida, and the opinion was written by Judge Locke. The headnote correctly states the case as follows: "An unliquidated claim for damages for breach of warranty in a contract may not be used as a basis for an adjudication in bankruptcy." In his opinion, Judge Locke refers to the fact that the ancient rule and practice was that a breach of an alleged warranty, although based on a contract, was not an action for the performance or fulfillment of the contract, but was an action on the case sounding in tort, and could only be presented as such. There is no contract, express or implied, that the Grant Shoe Company would pay the Laird Company any amount of money. It is liable, if at all, for damages on account of a breach of its contract. Judge Locke continues: "It is only the force of law that gives damages for the breach of a warranty in such a case. I consider it should be classed with actions for tort, deceit or fraud, rather than contract, such as is contemplated in section 63, subdivison (a) Cl. 4 of the Law of Bankruptcy." Judge Locke refers, also, to the fact that after an adjudication in bankruptcy, a claim similar to the one presented in this petition might be presented under subdivision (b), section 63 of the Bankruptcy Act, and it would be the duty of the court to determine how such claim, although unliquidated, might be thereafter proved and allowed against the estate. He further says: "But I do not consider that the law contemplated that such an unliquidated claim as this, not capable of proof by any practice in bankruptcy, should be made a basis of an adjudication in bankruptcy." In that case the petition was demurred to and the demurrer was sustained.

In *re Big Meadows Gas Company* (7 Am. Bkr. Rep. 697, 113 Fed. Rep. 974), was decided by the United States District Court for the Northern District of Pennsylvania in February, 1902, the opinion being written by Judge Buffington. There are other questions considered,—a portion of the claim being liquidated and a portion being unliquidated, but it was held that the claim being one claim, presented as such, must be considered an unliquidated claim. The element for unliquidated damages was for a breach of contract. The petitioner's claim was based upon a written instrument and non-performance of its provisions. And it was held that the unliquidated

character of some of the elements of the claim made it, as a whole, unliquidated, and subjected it as such to the limitations and statutory provisions incident to a claim of that kind. In his opinion, Judge Buffington uses the following language: "After careful and deliberate consideration of the question here involved, we have reached the conclusion that the unliquidated demand herein made only becomes a provable debt * * * after it has been judicially ascertained and liquidated in the statutory method set forth. Such construction is in accord with other provisions of the act. The provisions requiring petitioning creditors should have claims aggregating five hundred dollars in excess of all securities, evidences that Congress felt there should be definite, ascertained claims, and that, too, in excess of all securities, as a foundation upon which to base a petition to adjudicate one a bankrupt. Where a claim against another has not been judicially ascertained and where its validity and certainty are evidenced by no paper, acknowledgment, or other admission of the debtor, it would offend our sense of right to allow such self-asserted claim to constitute sufficient ground for harassing another with a petition in bankruptcy. It will readily be seen that an averred but unfounded claim might be made an effective weapon to enforce an unjust demand or even to bankrupt a struggling but solvent debtor. Of course, no such consequence would result from the case at hand. The property of the company has been sold at sheriff's sale, but the question raised is jurisdictional." Judge Buffington, at page 700, cites many cases supporting his construction of the act. An order was granted dismissing the petition.

In both of the cases just cited, the petition was founded upon an unliquidated claim. It does not appear that the claim was also disputed. But it was held in these cases that where the petitioner's claim is based upon breach of contract, he has no standing in court to present a petition for adjudication in bankruptcy, unless his claim has been liquidated.

Matter of Manhattan Ice Company, 7 Am. Bkr. Rep. 408; 114 Fed. Rep. 399, affirmed by the Circuit Court of Appeals in the Second Circuit in June, 1902, *sub nomine In re Stern* (8 Am. Bkr. Rep. 569; 116 Fed. Rep. 604), furnishes no authority against the claim that this petition should have been dismissed. In the *Manhattan Ice Company case* the claim was unliquidated, and it was based upon breach of contract. It appears that the fact of the breach of the contract was not disputed, and further, that the damage sus-

tained by reason of the breach were far in excess of the sum of five hundred dollars. The most then, that can be claimed for the *Manhattan Ice Company case*, is, that where the claim is founded upon breach of contract, and the claim of breach is not disputed, and it appears that the damage sustained is sufficient in amount, that then such creditor has a standing in court as a petitioning creditor asking for an adjudication in bankruptcy. The most of the opinion in the Circuit Court of Appeals, which was written by Judge Townsend, is devoted to the question of whether there was a present right of action following immediately upon the breach, although by the terms of the contract the time for its performance had not yet elapsed. It is submitted, no decision can be found which sustains a petition in involuntary bankruptcy, where the petitioner's claim is not only unliquidated, but is also disputed. Under the bankruptcy act there is no possible way for the defendant in error's claim to become liquidated, except pursuant to the provisions of section 63 (b), which provides for proving unliquidated claims in such manner as the court shall direct, and that after such proof, such claims may be proved and allowed against the estate. This plainly shows the intention of the statute, that there should first be an adjudication in bankruptcy before such unliquidated claim can be in any manner proved. It must then be liquidated in such manner as the court directs, and after such liquidation it may be proved. Such time, of course, had not arrived at the time defendant in error filed its petition nor when the motion to dismiss was made at the trial. The defendant in error had no standing in court, and had no provable claim upon which to base its petition. There is no provision in the law for ascertaining the exact amount of the defendant in error's claim, before adjudication, and as is stated by Judge Buffington in the case of *In re Big Meadows Gas Company*, cited above, it will readily be seen that an averred but unfounded claim might be made an effective weapon to enforce an unjust demand. This question is, of course, jurisdictional, and if plaintiff in error is right in its position, the petition in bankruptcy should have been dismissed. The remedy of defendant in error is at once apparent. It should first, in the proper forum, if it thought it had a valid cause of action, have brought an action for recovery of the damage which it claims to have sustained, and there the question could have been properly tried and decided by a jury. If it had succeeded, this claim would then have become liquidated, and it might then have a standing in court to present a petition of this character.

The cases of *Crawford vs. Burke, 195 U. S. 176,* and *Tindle vs. Birkett, 205 U. S. 183,* are not decisive of the question which we have here. In those cases bankruptcy proceedings had been instituted by others than the claimants. The claims held to be provable, that is, susceptible of being proved, found ready for that purpose the necessary machinery; nothing except action on the part of the claimants was necessary. Here no proceeding had been commenced at the time when, to sustain the jurisdiction of the District Court, it must be held that defendant in error had a provable claim. Here the provability of the claim depended upon the action of others. The claim existing, the question of its provability must rest upon the question of whether the claimant can by his sole, unaided act prove it. To do this he must have some forum in which to appear and adduce his testimony; he must have ready for his use some proceeding in some court which has jurisdiction to adjudicate upon his claim. In this case the claim of defendant in error, though provable in the sense that circumstances might arise which would make it susceptible of being proved, was not provable at the time of filing the petition in bankruptcy, because it could not then be proved. It is submitted the statute (Sec. 63 b. of the Bankruptcy Act) means exactly what it says. An unliquidated claim may, pursuant to application to the Court (there being a proceeding in which application can be made) be liquidated, and may *"thereafter"* be proved. Uuless this interpretation is given to the statute no meaning is given to the word "thereafter"; according to the plain words of the statute there must first be liquidation before such claim is provable.

Cases like the one at bar are not the only cases where the courts have held that a creditor has not a provable claim, though he may have a claim which may, at a later time, become such.

The Bankruptcy Act of 1898 contains provisions concerning preferences given within four months and then provides:

"Section 57, g. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Under this section a preferred creditor may, by surrendering his preference, prove his claim. Though he has a claim which, by proper action taken by him, may become provable, it cannot be said that he has a provable claim until such action is taken, and this is for the same reason as in the case of a creditor with a disputed unliquidated claim. In the one case, the creditor may never surrender his pref-

erence; in the other he may never be able to establish his disputed unliquidated claim. In both cases he has no provable claim until the event, under which the claim may become provable, happens.

The situation of an innocent preferred creditor with reference to proving his claim, under section 60, was considered by this court in *Pirie v. Chicago Title & Trust Company, 182 U. S. 438,* where it is held that a creditor who has received payments of money from an insolvent debtor within four months before petition in bankruptcy was filed for the debtor, but who did not know or have reasonable cause to believe that the payments were intended to give him a preference, the debtor not intending to give a preference, cannot be compelled, under the Bankruptcy Act, section 60, b, to repay the money to the trustee in bankruptcy, but under section 57, g, he must surrender the preference that he has received before any claim by him against the estate can be allowed.

The District Court had found the facts and made its first conclusion of law as follows:

"*First.* That the payment made by appellants to the bankrupts at the time and in the manner above shown constitutes a preference, and that by reason of the failure and refusal of said appellants to surrender said preferences, *they were not entitled to prove* their claim against the bankrupts' estate" (page 442) thus holding that until surrender the creditor had no provable claim.

This court, in affirming the decision below, states that "the question presented by this record is whether payments in money made by an insolvent debtor to a creditor, the debtor not intending to give a preference, and the creditor not having reasonable cause to believe a preference was intended, did nevertheless constitute a preference within the meaning of the Bankrupt Act of 1898, and were required to be surrendered *as a condition of proving* the balance of the debt or other claims of the creditor." (Page 443.) In discussing this question, this court says: "What a preference is, is plain. What the effect of it is, if taken under the conditions mentioned, is equally plain. So taken, it may be recovered back. If not so taken, it may be kept or surrendered. Unless surrendered, he who receives it *cannot prove his debt or other debts.* His election is between keeping the preference and surrendering it." (Page 447.) This court, by its decision in this case, has not only affirmed the finding of the court below, quoted above, but has taken occasion in its opinion to empha-

size the affirmance by restating the fact that until surrender the preferred creditor cannot prove his debt; that is, has no provable claim.

See also,

In re Rogers Milling Co. 4 Am. Bkr. Rep. 540.
In re Gillette & Prentice, 5 Am. Bkr. Rep. 119.
Phillips v. Dreher Shoe Co. 7 Am. Bkr. Rep. 326.

The judgment of the District Court should be set aside and reversed, and this court should decree that said petition in bankruptcy be dismissed for want of jurisdiction, with costs.

SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Plaintiff in Error,
Rochester, N. Y.

P. M. FRENCH, *of Counsel.*

OCT 7 1907
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

October Term, 1907, No. 35.

FREDERIC L. GRANT SHOE COMPANY

Plaintiff in Error,

against

W. M. LAIRD COMPANY OF PITTSBURGH, PA.

Defendant in Error.

BRIEF FOR DEFENDANT

IN ERROR ON MOTION TO DISMISS WRIT OF ERROR

McGUIRE & WOOD,

Attorneys for Defendant in Error,

Rochester, N. Y.

able claim for any amount against the shoe company within the meaning of subdivision b of section 19 of the Bankruptcy Act, and consequently was not entitled to file a petition in bankruptcy against the alleged debtor. The motion to dismiss was denied by the district judge. 11 Am. B. R. 48, 125 Fed. 576. In the order entered it was directed that the claim of the petitioner be liquidated by the jury at the jury trial demanded by the alleged bankrupt for the determination of the issues as to insolvency and the commission of acts of bankruptcy. On the petition of the alleged bankrupt to review this order it was affirmed by the Circuit Court of Appeals for the Second Circuit. 12 Am. B. R. 349, 130 Fed. 881.

A trial of the issues thus raised was then had before a jury in May, 1905, and, at the close of all the evidence the court having directed the jury to find a verdict that the said alleged bankrupt did, within four months of the filing of the petition herein, commit an act of bankruptcy, in that it transferred a portion of its property to the German-American Bank of Rochester, one of its creditors, with the intent to prefer said German-American Bank over its over creditors, and that at the time of said transfer said alleged bankrupt was insolvent, and that the petitioner had a provable claim against said alleged bankrupt for damages for the breach of warranty in the sale of shoes, and that the amount of such claim of the petitioner was the sum of $3,454.00, the jury found a verdict accordingly. An order was thereupon entered adjudicating the shoe company a bankrupt, and declaring that the claim of the Laird Company was liquidated at the sum of $3,454.00.

An appeal was then taken to this Court.

For the purpose of that appeal, and reciting that it was pursuant to the requirements of General Order in Bankruptcy No. 36, the trial judge made and filed findings of fact and conclusions of law. A single question of jurisdiction was certified as having been raised at the opening of the trial in May, 1905, by motion to dismiss, substantially upon the grounds urged in the previous motion to dismiss, which had been passed upon by the Circuit Court of Appeals.

That appeal was dismissed by this Court in December, 1906 upon the ground that the record should have been brought to this Court by writ of error, and not by appeal. (17 Am. B. R. 1.)

The judgment appealed from was entered by the District Court on the 8th day of June, 1905, and a writ of error herein, was allowed by the District Judge on the 6th day of February, 1907. (Page 16 of the Record.)

POINTS.

I.

THE WRIT OF ERROR WAS NOT SUED OUT IN TIME AND THE SAME SHOULD BE DISMISSED.

The writ of error herein, was allowed and sued out on February 6th, 1907, and the judgment sought to be reviewed was entered on the 8th of June, 1905. Thus, a period of one year and eight months elapsed from the entry of the judgment to the date of the writ.

It is the law of this case that the judgment can be reviewed in this court only by writ of error and not by appeal.

The record contains no bill of exceptions, nor was any bill of exceptions made or signed by the trial court.

Under the common law, a writ of error must be brought within two years after the entry of judgment.

"No judgment, decree or order of a * * * * District Court * * * * in any civil action at law, or in equity, shall be reviewed in the Supreme Court on writ of error or appeal, unless the writ of error is brought or the appeal is taken within two years after the entry of such judgment, decree or order." (*U. S. R. S. Sec. 1008.*)

At common law no judgment after a trial by jury, can be reviewed unless the record contains a bill of exceptions. The question is then presented, can this judgment, to be reviewed under the common law practice, be reviewed without a bill of exceptions, or is the writ of error herein to be treated as an appeal under the provisions of the Bankruptcy Law?

The Evarts Act provides that the question of jurisdiction alone shall be certified to the Supreme Court from the Court below, and speaks of "appeals" or "writs of error" as though synonymous, when it declares that appeals or writs of error may be taken from the District Court direct to the Supreme Court in any case in which the jurisdiction of the Court is in issue.

Following this Act, the plaintiff in error obtained the certificate, required thereby (Page 17), but the Evarts Act is silent upon the subject of a bill of exceptions and makes no provision for "findings of fact" and "conclusions of law."

General Order in Bankruptcy, No. 36, subdivision 3 provides:

> "In every case in which either party is entitled by the Act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies, shall, at or before the time of entering its judgment or decree, make and file a finding of the facts and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States, on such an appeal, shall consist only of the pleadings, the judgment or decree, the findings of fact and the conclusions of law."

Neither the Bankruptcy Law nor the General Orders provide in terms for any method of review by writ of error, and it is our contention that this Court, in framing section 36 of the General Orders in Bankruptcy, intended by the word "appeal" to cover the procedure by whatever method the determination of the lower court was to be reviewed in this Court. That is to say, that writ of error and notice of appeal were deemed to be synonymous and that in any case where, as in the case at bar, it became necessary to review the determination of the Court below by a writ of error, the record upon such review should contain only the papers specified in Subdivision 3 of General Order No. 36, and that therefore no bill of exceptions is necessary. That the findings of fact and conclusions of law of the District Court take the place of the bill of exceptions, provided for under the common law practice.

Subdivision 2 of General Orders in Bankruptcy No. 36, provides as follows:

> "Appeals under the Act to the Supreme Court of the United States * * * from any court of Bankruptcy whatever, shall be taken within thirty (30) days after the judgment or decree, and shall be allowed by the judge of the court appealed from, or by a justice of the Supreme Court of the United States."

If we treat the writ of error as an appeal to this Court from the District Court, as provided for above, we think that the appeal was sufficiently allowed by the phraseology of the writ signed by the

District judge so as to conform to that part of Subdivision 2, above referred to. (See page 16), where the Court below says:

> "Upon consideration whereof, the Court does allow the writ of error upon the said Frederic L. Grant Shoe Company's giving a bond according to law in the sum of $250.00, which shall operate as a supersedeas bond."

It must be clear therefore, that if the writ of error herein is to be treated as an appeal, provided for by the Bankruptcy Act, it was not taken within the thirty (30) days limitation, provided for in Subdivision 2 of General Orders in Bankruptcy, No. 36.

It cannot be that it was the intention of this Court, in framing the General Orders in Bankruptcy, to give to a person who had been adjudicated a bankrupt by the Court and not after a trial by jury, thirty days in which to appeal, and at the same time give to a person who had been adjudicated a bankrupt after a trial by jury, two years in which to appeal by writ of error.

If this Court is of the opinion that the common law practice applies in the case at bar with the exception of the certificate, provided for by the Evarts Act, and that the record must be brought here by bill of exceptions and writ of error in accordance with such practice, then, this writ must be dismissed, because of the failure to have made and signed, a bill of exceptions, as required under the common law practice.

If this Court is of the opinion that General Orders in Bankruptcy, No. 36, giving a right of review, is to be construed to mean an appeal either by notice of appeal or by writ of error, and that the findings of fact and conclusions of law, required by Order No. 36, take the place of the bill of exceptions required under the common law, then and in that event, this appeal must be dismissed, because it was not taken within the thirty days provided for by such General Order.

It is respectfully submitted, that in either event, the writ of error herein must be dismissed.

HIRAM R. WOOD,
Attorney for Defendant in Error,
Rochester, N. Y.

Supreme Court of the United States

October term, 1907, No. 35.

FREDERIC L. GRANT SHOE COMPANY,
Plaintiff in Error,

against

W. M. LAIRD COMPANY OF PITTSBURGH, PA.,
Defendant in Error.

In Error to the United States District Court, Western District of New York.

BRIEF FOR DEFENDANT IN ERROR

McGUIRE & WOOD,
Attorneys for Defendant in Error,
Rochester, N.

Supreme Court of the United States.

OCTOBER TERM, 1907, No. 250.

FREDERIC L. GRANT SHOE COMPANY,
Plaintiff in Error,

vs.

W. M. LAIRD COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

This has been a protracted litigation having for its object the determination of a single, simple question viz: *May an involuntary bankruptcy proceeding be founded upon the petition of a creditor whose claim is upon an express contract for unliquidated damages?* In other words is an insolvent whose debts are all for unliquidated damages arising upon breaches of express contracts *immune* and exempt from involuntary bankruptcy proceedings?

There are now two proceedings before this Court for determination,

(1.) The motion of the defendant in error to dismiss the writ of error herein. (The motion and briefs of counsel were filed in October, 1907, whereupon the Court ordered the matter held until the argument of the cause on the merits).

(2.) The plaintiff's appeal by writ of error from the judgment of the District Court, declaring it bankrupt.

HISTORY OF THE LITIGATION.

That the numerous motions, petitions for review, appeals, etc., resorted to by the plaintiff in error to escape being adjudicated a bankrupt may not be confused the steps in the litigation will be briefly stated in their order.

(1.) Petition in involuntary bankruptcy proceedings against the plaintiff in error filed by the defendant in error July 15, 1903, alleging besides other jurisdictional facts, the insolvency of the alleged bankrupt, that it had committed several acts of bankruptcy and that petitioner's claim was for $3,732.80 being the amount of damages it had suffered from breaches of express warranty accompanying the sale of 1864 pairs of shoes manufactured for the petitioner by the alleged bankrupt (the plaintiff in error) and for which the petitioner had paid the full purchase price. (Record pp. 1-3).

(2.) Motion by the alleged bankrupt in the District Court to dismiss the petition for want of jurisdiction, filed with its answer in which it denied insolvency (fol. 12), denied the making of a warranty (fol. 13), denied that the petitioner had suffered damage (fol. 13) and denied that it had committed any acts of bankruptcy. In its answer the alleged bankrupt demanded a jury trial of the issues. The motion to dismiss was denied by the District Court, Sept. 2nd, 1903. The Court in its order provided that the amount of the petitioner's claim should be established upon the jury trial which had been demanded. (Opinion of District Judge, Record p. 12 Stipulation, Record p. 19).

Reported 125 Fed. Rep. 576, 11 Am. Bkr. Rep. 48.

(3.) Appeal to the United States Circuit Court of Appeals, Second Circuit, by petition for review, from the order of the District Court denying the alleged bankrupt's motion to dismiss. Order appealed from affirmed April 21st, 1904. (Record p. 19, fol. 43).

Reported 130 Fed. Rep. 881, 12 Am. Bkr. Rep. 349.

(4.) May, 1905, Trial of the issues before the District Judge and jury. No defense offered. *Motion to dismiss for want of*

jurisdiction upon precisely the same grounds as previous motion, denied (fol. 42). Verdict by direction of the court finding insolvency, commission of acts of bankruptcy, making of warranty, breaches thereof and damages amounting to $3,454. Adjudication in bankruptcy entered June 8, 1905 (fols. 15-17). Findings of fact and conclusions of law made by District Judge June 7, 1905, (fols. 18-23). Assignments of Error raising jurisdictional question alone, filed June 7, 1905, (fols. 26-27). *No bill of exceptions.*

(5.) Direct appeal to this Court by notice of appeal upon certificate of District Judge that a jurisdictional question alone was involved June 7, 1905, (fols. 39-41). Appeal dismissed by this Court upon the ground that the record should have been brought up by writ of error and not by appeal, December, 1906.

Reported 203 U. S. 502, 17 Am. Bkr. Rep. 1.

(6.) Writ of error to review judgment of District Court allowed February 6, 1907, (fol. 36). New assignments of error identical with former, (fols. 26-30). *No bill of exceptions.*

(7.) Motion by defendant in error to dismiss writ of error. Same held until argument upon merits.

POINTS.

FIRST.

THE CLAIM OF THE DEFENDANT IN ERROR WAS AND IS A PROVABLE CLAIM.

The provisions of the Bankruptcy Act which bear upon the question involved, are as follows:

"Section 59. **Who may file and dismiss petitions.**

* * * * * * *

(b) Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of

the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

"Section 63. **Debts which may be proved,**

(a) Debts of the bankrupt may be proved and allowed against his estate which are * * * * *."

"(4) Founded upon an open account or upon a contract express or implied. * * * * *."

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

"Section 17. **Debts not affected by a discharge,**

A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as

(1) are due as a tax * * * * *

(2) are liabilities for obtaining property by false pretenses * * * * *

(3) have not been scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or

(4) were created by his fraud * * * * *."

It is clear that the defendant in error is within Sections 59 and 63 of the Act above quoted. It was alleged in the petition and admitted in the answer that the creditors of the plaintiff in error were less than twelve in number; it was alleged that the claim of the defendant in error was founded upon an express contract; and it was alleged in the petition that the amount of the claim of the defendant in error was in excess of $500.00.

The point made by the plaintiff in error, and the only point seriously urged at any time, was that the petitioner's claim was not a provable claim, because it was for unliquidated damages. It is true that the bankrupt in its answer denied the making of any contract of warranty; denied that the petitioner had sustained damage; denied

that it had committed any act of bankruptcy, etc., but the value of such denials became apparent when upon the trial it declined to give any evidence whatever in opposition to the petitioner's proofs, and judgment went against it practically by default.

The argument of the plaintiff in error proceeds upon narrow and technical lines. Because Sub-section B, of Section 63 provides that unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate, it is argued that a claim for damages arising upon a breach of an express contract where the damages are not liquidated, is not a provable claim.

The error of the counsel for the plaintiff in error lies in his failure to distinguish between the terms "provable claim" "proof of claim" and "allowance of claim." There is a clear distinction running through the entire Bankruptcy Act, and though the terms are sometimes used interchangeably, the distinction in meaning is always apparent. It is pointed out in *In re Hornstein,* (10 Am. Bkr. Rep. 308, pages 317-321.)

> A provable claim is any claim within the classes specified in section 63a, liquidated or unliquidated, secured or unsecured.
>
> Proof of claim is a deposition in a certain form showing the grounds of the claim, the amount thereof and containing certain other information in regard thereto. The act of proving a claim consists in verifying the proof and filing it with the referee.
>
> The allowance of a claim is the judicial determination of the validity and amount of a claim which has been proved.
>
> In other words, a claim for unliquidated damages is a provable claim, although the creditor may not until the damages have been liquidated as directed by the Bankruptcy Court, either make a deposition as to its amount or procure its allowance.

The contention of the counsel for the plaintiff in error is that unless a bankruptcy proceeding has been instituted by some other creditor, a creditor having an unliquidated claim for damages arising upon a breach of an express contract, must first sue his debtor and obtain a judgment before instituting bankruptcy proceedings. The Bankruptcy Act provides that a petition may be filed against

a person who is insolvent and who has committed an act of bankruptcy at any time within four months from the commission of the act of bankruptcy. In such a case, if counsel's contention is true, a debtor could commit an act of bankruptcy and by getting extensions of time and other dilatory tactics, and on account of the condition of the calendars of our state courts, succeed in preventing a creditor from having a just claim liquidated within four months after the commission of the act of bankruptcy and thus prevent the creditor from ever filing a petition. It is plain that it was the intent of Sub-section b, by giving the Bankruptcy Courts the power to liquidate claims to prevent the four months provision from working injustice as was stated by Judge Townsend upon the appeal to the Circuit Court of Appeals:

> "To hold, as is contended by the alleged bankrupt that the claim is not provable because the amount of the claim itself is not determinable, or its validity is disputed, would defeat the purpose of the involuntary provisions of the Bankruptcy Act." (12 Am. Bkr. Rep. page 350).

In considering this question, reference may well be had to section 17 of the Bankruptcy Act which concerns debts dischargeable in bankruptcy. That section provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as are specifically enumerated. In *Crawford v. Burke,* (195 U. S. 176), where there was before this court the question of whether or not a claim had been discharged by bankruptcy proceedings, Mr. Justice Brown writing for the court, said at page 193:

> "But we think that section 63a, defining provable debts, must be read in connection with section 17, limiting the operation of discharges, in which the provable character of claims for fraud in general is recognized, by excepting from a discharge claims for frauds which have been reduced to judgment, or which were committed by the bankrupt while acting as an officer, or in a fiduciary capacity. If no fraud could be made the basis of a provable debt, why were certain frauds excepted from the operation of a discharge? We are, therefore, of opinion that if a debt originates or is "founded upon an open account or upon a contract, express or implied," it is provable against the bankrupt's estate, though the creditor may elect to

bring his action in trover as for a fraudulent conversion, instead of in assumpsit for a balance due upon an open account. It certainly could not have been the intention of Congress to extend the operation of the discharge under section 17 to debts that were not provable under section 63a. It results from the construction we have given the latter section that all debts originating upon an open account or upon a contract, express or implied, are provable, though plaintiff elect to bring his for fraud."

In *Crawford v. Burke,* the principle is laid down that if the claim is dischargeable, it must be provable, and it will be conceded that the claim of the defendant in error for unliquidated damags arising upon a breach of an express contract, is dischargeable. It therefore, follows that it must be provable. It would seem that the decision in *Crawford v. Burke* is controlling in the case at bar.

SECOND.

THE PLAINTIFF IN ERROR IS CONCLUDED BY THE DECISION OF THE CIRCUIT COURT OF APPEALS AFFIRMING THE ORDER OF THE DISTRICT COURT DENYING THE ALLEGED BANKRUPT'S PRELIMINARY MOTION TO DISMISS FOR WANT OF JURISDICTION.

The writ of error herein is prosecuted under the authority of the Judiciary Act of March 3rd, 1891, (26 U. S. Statutes at Large, page 826, chapter 517).

With its answer denying the allegations of the petition in the bankruptcy proceedings, the plaintiff in error filed a preliminary motion with the District Court asking that the proceeding be dismissed for want of jurisdiction. That motion was denied and from the order denying the motion the plaintiff in error appealed by petition for review to the United States Circuit Court of Appeals for the Second Circuit. The order appealed from was there affirmed. (fol. 43). The preliminary motion made in the District Court and reviewed in the United States Circuit Court of Appeals was upon the identical grounds afterward urged upon the trial of the proceeding upon the merits before the District Court. (fols. 42-43) and the plaintiff in error now seeks to review in this court, the

identical question which was considered in the Circuit Court of Appeals.

The Judiciary Act of March 3rd, 1891, constituting the United States Circuit Courts of Appeals, conferred jurisdiction upon the courts so constituted to review by appeal or by writ of error final orders and decrees of District Courts and existing Circuit Courts.

Section 24b of the Bankruptcy Act of 1898 (Jurisdiction of Appellate Courts) confers additional appellate jurisdiction in bankruptcy matters as follows:

> "The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Before the adoption of the Bankruptcy Act of 1898, it had been held in *McLish v. Roff,* 141 U. S. 661; *United States v. Jahn,* 155 U. S. 109, 114; *Robinson v. Caldwell,* 165 U. S. 359; *Columbus Construction Co. v. Crane Co.* 174 U. S. 600, and in numerous other cases that an aggrieved party in a cause where a jurisdictional question was involved, must elect whether he would appeal to the Circuit Court of Appeals upon the whole case, or whether he would appeal upon the jurisdictional question alone directly to the Supreme Court and that he could not have both remedies.

It is true that under the Judiciary Act of March 3rd, 1891, it was possible to appeal to the Circuit Court of Appeals only, from a final judgment or decree of a District or Circuit Court, and that a jurisdictional question could be certified to the Supreme Court only, upon an appeal from a final judgment of a District or Circuit Court. The reasoning of the courts in the cases holding that both appeals could not be had proceeds upon the theory that an aggrieved party ought not to have the same question reviewed on appeal by two separate courts at the same time. The decisions do not rest upon the proposition that the appeals are from final or interlocutory judgments. As was stated by Mr. Justice Lamar in *McLish v. Roff,* supra, page 668:

> "The fallacy which underlies this argument is the assumption that the Act of 1891, contemplates several separate appeals

in the same case and at the same time to two appellate courts. No such provision can be found in the act either in express terms or by implication. The true purpose of the Act as gathered from its context, is that the writ of error, or the appeal may be taken only after final judgment except in the cases specified in section 7 of the Act. When that judgment is rendered, the party against whom it is rendered, must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Apeals may, if it deem proper, certify the question of jurisdiction to this court."

It is true that the decisions above cited were made before the adoption of the Bankruptcy Act of 1898, and that by that Act, the Circuit Courts of Appeals have been invested with appellate jurisdiction in bankruptcy matters upon interlocutory orders and decrees, and that now an interlocutory order in a bankruptcy matter may be revised in matters of law by the Circuit Courts of Appeal. No reason is perceived, however, why the decision of the Circuit Court of Appeals upon the review of an interlocutory order, should not be binding upon the party aggrieved where the decision of the same court upon the same question, reviewed on an appeal from a final order would be binding. No doubt, it was the intention of the Congress to invest the Circuit Courts of Appeals with additional appellate jurisdiction in respect to interlocutory orders in bankruptcy proceedings for the purpose of facilitating and hastening the disposition of bankrupt estates. If the contention of the counsel for the plaintiff in error is correct, then the effect of Sub-section b, of Section 24 of the Bankruptcy Act is rather to encumber and embarrass and prolong litigation in bankruptcy matters.

At the out-set of this proceeding, the alleged bankrupt had its election as to the manner in which the jurisdictional question, here involved, might be raised. It might make its motion, as it did, in the District Court and if defeated, then appeal from the interlocutory order to the Circuit Court of Appeals, thus obtaining easily and quickly and cheaply a final determination of the question of jurisdiction, or it might raise the question in its answer, go to trial upon the whole case and when a final judgment was rendered, if it felt itself aggrieved, have the option of appealing directly to the Supreme

Court upon the jurisdictional alone, or of appealing upon the whole case to the Circuit Court of Appeals whose decision would be final upon all of the questions in the case, unless the Circuit Court of Appeals certified the jurisdictional question to the Supreme Court, or the Supreme Court acquired jurisdiction of it by certiorari, or otherwise. It is inconceivable and absurd that the plaintiff in error should have the benefit of separate appeals to two separate courts upon the same identical question.

THIRD.

THE WRIT OF ERROR SHOULD BE DISMISSED FOR THE REASONS STATED ON THE MOTION TO DISMISS.

The argument upon the part of the defendant in error to dismiss the writ of error is fully set forth in our brief upon the motion heretofore filed.

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it is under § 24*b* of the Bankruptcy Act; and a merely interlocutory decision in such a proceeding cannot prevent a case otherwise proper to be brought here, from being taken to this court after final judgment.

Provable claims, on which a petition to have the debtor adjudicated a bankrupt under § 59*b* of the Bankruptcy Act can be based, are claims that can be proved in the proceedings, and a liquidation may be ordered on the filing of the petition to ascertain whether the petition is based on a provable claim.

A provable claim may be based on the breach of an express warranty.

THE facts are stated in the opinion.

Mr. P. M. French for plaintiff in error.

Mr. Hiram R. Wood for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case comes up on a certificate concerning the jurisdiction of the District Court on the following facts: The W. M. Laird Company filed a petition in bankruptcy against the Frederic L. Grant Shoe Company, alleging acts of bankruptcy and setting up a claim for $3,732.80 for the breach of an express warranty of shoes sold to it by the latter. The Shoe Company answered, denying the foregoing allegations, and denying that the claim alleged was a provable claim. The case coming on to be tried before a jury, it moved the court to dismiss the proceeding for want of jurisdiction. The motion was denied, and insolvency and acts of bankruptcy being admitted, the claim was liquidated at $3,454, the Shoe Company offering no evidence. The Shoe Company was adjudged a bankrupt, and at the same time the judge certified that the jurisdiction of the court to make such an adjudication on a claim for unliquidated damages was the only question in issue. Afterwards this writ of error was brought, the taking of jurisdiction being the only error assigned.

It already has been decided between these parties that a writ of error, not an appeal, is the proper means of bringing the

case here. 203 U. S. 502. But the defendant in error moves to dismiss on the grounds that the writ was not sued out in time, because General Order 36 (2), allows only thirty days for appeals; and that no bill of exceptions was filed. Neither reason is good. The statutes fix the time within which writs of error may be brought. Rev. Stat. § 1008. See Act of March 3, 1891, c. 517, §§ 4, 5; 26 Stat. 826, 827; *Allen* v. *Southern Pacific R. R. Co.*, 173 U. S. 479, 486. A bill of exceptions was not necessary, as it would have added nothing to what is patent on the face of the record. *C. H. Nichols Lumber Co.* v. *Franson*, 203 U. S. 278.

Perhaps it should be mentioned that a motion to dismiss, earlier than the one we have mentioned, was made and overruled, 125 Fed. Rep. 576, and that thereafter, on a petition for review, the decision was affirmed by the Circuit Court of Appeals. 130 Fed. Rep. 881. Although in the report the case is headed "In Error to the District Court," it appears by stipulation that the proceeding was a revisory one under § 24*b* of the Bankruptcy Act, the order having been interlocutory. It is suggested that the plaintiff in error is concluded by the action of the Circuit Court of Appeals. But notwithstanding the objections to a double resort, we do not perceive how such an interlocutory decision, even of the higher court, can prevent a case, otherwise proper to be brought here, from being taken up after a final judgment is reached.

Coming to the question certified, we are of opinion that the decision of the courts below was right. The argument to the contrary is based on the letter of the statute, and is easily stated and understood. By § 59*b* petitions to have a debtor adjudged a bankrupt may be filed only by creditors who have provable claims. By § 63*b*, "Unliquidated claims against the bankrupt, may, pursuant to application to the court, be liquidated in such a manner as it shall direct, and may thereafter be proved and allowed against his estate." The word "thereafter" shows, it is said, that they are not yet proved to exist when merely presented and sworn to. Therefore it does not

FREDERIC L. GRANT SHOE COMPANY *v.* W. M. LAIRD COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

No. 35. Argued December 2, 1908.—Decided February 23, 1909.

The time within which a writ of error may be brought to review an adjudication of bankruptcy of the District Court is two years as regulated by §§ 4, 5, of the act of March 3, 1891, c. 517, 26 Stat. 826, 827, and not thirty days, the time fixed for appeals by general order of this court in bankruptcy, No. 36. *Allen* v. *Southern Pacific Co.*, 173 U. S. 479.

A bill of exceptions is not necessary when it adds nothing to the record. *C. H. Nichols Lumber Co.* v. *Franson*, 203 U. S. 278.

The objections to a double resort to review decisions of the lower courts to both the Circuit Court of Appeals and this court do not apply where the proceeding in the Circuit Court of Appeals is merely revisory as

yet appear that there is any foundation for the proceeding, in the requisite amount or even the existence of the claim. But there must be a proceeding in court before a liquidation can take place, and, therefore, the claim cannot be liquidated until a proceeding is started in some other way. In short, the claim upon which the petition is based must be provable when the petition is filed, and this claim was not provable then since by the express words of the act it had to be liquidated before it could be proved.

On the other hand, by the equally express words of § 63*a*, among the debts that may be proved are those founded upon a contract, express or implied. Again, by § 17, the discharge is of all "provable debts" with certain exceptions, and it would not be denied that this claim would be barred by a discharge. *Tindle* v. *Birkett*, 205 U. S. 183. If the argument for the plaintiff in error is sound a creditor for goods sold on a *quantum valebant* would be as badly off as the petitioner, and both of them might be postponed in reducing their claims to judgment until it was too late. The intimation in *Tindle* v. *Birkett*, *sup.* and *Crawford* v. *Burke*, 195 U. S. 176, are adverse to such a result. The whole argument from the letter of the statute depends on reading "provable claims" in § 59*b* as meaning claims that may be proved then and there when the petition is filed. But if it can be seen then and there that the claims are of a kind that can be proved in the proceedings the words are satisfied; and further, no reason appears why a liquidation may not be ordered on the filing of the petition to ascertain whether it is filed rightly or not.

It is said that an unfounded claim of this sort might be used as a weapon to enforce an unjust demand or to make a solvent but struggling debtor bankrupt. *In re Big Meadows Gas Co.*, 113 Fed. Rep. 974. But an unjust demand may be made for a liquidated sum also, and we have mentioned the injustice on the other side. Again it has been suggested that a cause of action for a breach of warranty really is for deceit and sounds in tort, claims for torts not being mentioned among the "Debts

which may be proved" in § 63*a*. *In re Morales*, 105 Fed. Rep. 761. No doubt at common law a false statement as to present facts gave rise to an action of tort, if the statement was made at the risk of the speaker, and led to harm. But ordinarily the risk was not taken by the speaker unless the statement was fraudulent, and it was precisely because it was a warranty, that is, an absolute undertaking by contract that a fact was true, that if a warranty was alleged it was not necessary to lay the *scienter*. *Schuchardt* v. *Allens*, 1 Wall. 359; *Norton* v. *Doherty*, 3 Gray, 372. In other words, a claim on a warranty as such necessarily was a claim arising out of a contract, even if in case of actual fraud there might be an independent claim purely in tort.

Judgment affirmed.